JAMES T. HUNT
BARRISTER & SOLICITOR

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December 13, 2011

TO: KIRSTEN WALLI
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto, Ontario M4P 1E4

AND TO: ALL PARTICIPANTS IN EB-2011-0361 & EB-2011-0376

Dear Ms. Walli:

Re: Langley Utilities Contract Ltd. ("Langley")
v Enersource Hydro Mississauga Services Inc.("Enersource")
Notice of Application of Intervenor, Notice of Combined Hearing and Procedural Order No. EB-2011-0361 & EB-2011-0376

Enclosed herewith is our Submission to the Ontario Energy Board for the intervenor PowerlinePlus Ltd.

Yours very truly,

James T. Hunt

JTH:jl

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an application by Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other orders.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998*.

SUBMISSIONS OF POWERLINE PLUS LTD. INTERVENOR RE: NOTICE OF APPLICATIONS, NOTICE OF COMBINED HEARING AND PROCEDURAL ORDER NO. 1

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INDEX

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an application by Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other orders.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998*.

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INDEX (continued)

TAB 1

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an application by Goldcorp Canada Ltd. and Goldcorp Inc. for an order under section 19 of the *Ontario Energy Board Act, 1998* declaring that certain provisions of the Ontario Energy Board's *Transmission System Code* are *ultra vires* the *Ontario Energy Board Act, 1998* and certain other orders.

AND IN THE MATTER OF an application by Langley Utilities Contracting Ltd. for a determination as to whether certain services are permitted business activities for an affiliate of a municipally owned electricity distributor under section 73 of the *Ontario Energy Board Act, 1998*.

SUBMISSIONS OF POWERLINE PLUS LTD. INTERVENOR RE: NOTICE OF APPLICATIONS, NOTICE OF COMBINED HEARING AND PROCEDURAL ORDER NO. 1

INTRODUCTION

1. On September 10, 2009, the intervenor Powerline Plus Ltd. ("**Powerline**") filed material with the Ontario Energy Board, in accordance with the instructions of Ontario Energy Board staff by e-mail, for a determination as to whether services contemplated under the Corporation of the City of Brampton Contract No. 2008-087 are permitted business activities which an affiliate of a municipally-owned electricity distributor can lawfully carry on under section 73 of the *Ontario Energy Board Act, 1998*; SO 1998, c 15 Schedule B (See Tab 4).

2. In spite of several requests for a full hearing before the Board, Powerline has not received any hearing until the Langley Utilities application was commenced.

3. Attached at Tab 2 is a letter dated October 13, 2009 from Barbara Robertson, Manager of Retail Markets and Compliance Management, Regulatory Policy and Compliance, Powerline asking Powerline to provide the following documents:

    1. Statement of Claim
    2. Statement of Defence
    3. Applicant's Motion Record
    4. Respondent's Motion Record
    5. Judge's reasons and Order

4. In a letter dated October 22, 2009 to Ms. Robertson, the following materials were provided:

    1. Statement of Claim
    2. Motion Record of the Defendant
    3. Factum of the Defendant
    4. Factum of the Respondent
    5. Adendum to the Factum of the Respondent
    6. Index to Book of Authorities
    7. Index to Adendum to Book of Authorities
    8. Judge's reasons and Order

5. Before deciding whether to hear the Langley Utilities application, the Board has called the hearing on threshold questions to determine whether there is a statutory basis for the Board to hear the Langley Utilities application under section 19(1) of the OEB Act or alternatively whether it is appropriate for the Board to hear the application on its own motion pursuant to section 19(4) of the Act.

BACKGROUND

6. In August 2008, the City of Brampton requested proposals to invite tenders to pre-qualify for routine and emergency maintenance of street lighting and other devices in the City of Brampton. The plaintiff Powerline bid on the project as did the defendant, Enersource Hydro Mississauga Services Inc. which is an affiliate of Enersource Hydro Mississauga Inc. The defendant Enersource Hydro Mississauga Services Inc. is a regulated utility defined under the *Ontario Energy Board Act*.

7. The defendant Enersource Hydro Mississauga Services Inc. was the bidder ultimately chosen for the contract with Powerline being the second lowest bidder.

COMPLIANCE BULLETINS

8. On November 5, 2010 and April 12, 2011, Board's staff released posted compliance bulletins indicating that Section 73(1) of the *OEB Act* with respect to the provision of street lighting services was a permitted item. This was the subject matter not only of Langley Utilities' application but the application made previously by Powerline. The November bulletin does not state that street lighting services can be offered outside of the jurisdiction but the April bulletin states the following:

> "The provision of street lighting services by an affiliate can be permitted under items 6 and 9 of Section 73(1) of the *OEB Act*."

9. There are disclaimers on the bulletins indicating that these are not decisions of the Ontario Energy Board.

NEED FOR BOARD DECISION

10. One of the fundamental concerns within the Ontario Energy Board Act requires that the Board consider such things as competition sufficient to protect the public interest. (See for example Section 29(1) and Section 29(3) attached at Tab 4.)

11. The Ontario Energy Board as an energy regulator has a mandate that requires it to make decisions in the public interest and those decisions have an immediate and substantial impact on the pubic at large. Where the actions of an energy regulator such as the Ontario Energy Board can have a direct economic impact on parties, there are no real threshold issues, and a hearing ought to be held.

12. The Ontario Energy Board is governed by the terms of the *Statutory Power Procedures Act* RSO 1990, c. S. 22 which requires that a tribunal give its decision and order in writing and give reasons also in writing if requested by a party.

13. In the Order of the Honourable Mr. Justice Shaughnessy dated Tuesday, August 18, 2009 at Tab 6, the court ordered that the action between Powerline Plus and the defendants including the defendant Enersource Hydro Mississauga Services Inc. be stayed pending a decision by the Ontario Energy Board ("the OEB") including any appeal(s) therefrom, on whether the services contemplated under the corporation of the City of Brampton Contract No. 2008-087 are permitted business activities which an affiliate of a municipally owned electricity distributor can lawfully carry on under section 73 on the *Ontario Energy Board Act*, 1998; S.O. 1998, c. 15, schedule B (Tab 4).

14. A tribunal may interpret its enabling statute broadly to ascertain whether it has the necessary power to perform a specific act.

Tab 7 **Morgan v. Windsor (Roman Catholic Separate School Board) [1979] O.J. No. 4542**

Tab. 8 **CUPE, Local 1325 v. Toronto Board of Education (1976), 14 O.R. (2d) 481 (Div. Ct.)**

15. A tribunal cannot refuse to exercise its powers nor can its powers be expanded by contract between the tribunal and the parties it regulates.

Tab 9 **Ontario (Chicken Producers' Marketing Board) v. Canada (Chicken Marketing Agency), [1993] 1FC 116 (TD).**

16. Section 19(1) (Tab 4) of the *OEB Act* has been found by the courts to confer jurisdiction on the Ontario Energy Board to hear and decide all questions of fact and law arising from a claim or other matters that are properly before it including the power to rule on the validity of relevant contracts and deal with other substantive legal issues.

Tab 10 **Snopko v. Union Gas Ltd. (2010) ONCA 248**

17. The authority of the Energy Board has been recognized further by the Ontario Court of Appeal as a specialized expert tribunal with broad authority to regulate the energy sector in Ontario and in its mandate is required to balance the number of sometimes competing goals.

Tab 11 Natural Resource Gas Ltd. v. Ontario Energy Board [2006] O.J. No. 2961 (CA)

18. As part of its objectives the *Ontario Energy Board Act*, Section 1 (Tab 4) states the following:

> "The Board, in carrying out its responsibilities under this or any other act in relation to electricity, shall be guided by the following objectives:
>
> 1. To protect the interests of consumers with respect to prices and the adequacy, or liability and quality of electricity service.
>
> 2. To promote economic efficiency and cost effectiveness and the generation, transmission, distribution, sale and demand management of electricity to facilitate the maintenance of a financially viable electricity industry."

19. In order to protect the interest of consumers and to promote economic efficiency and cost effectiveness of the electricity industry, the Board ought to be able to rule

on contracts which have the potential to compromise the reliability, quality and price of electricity services.

20. Consideration of Section 73 on the list that is contained within it, are clearly within the mandate of the Ontario Energy Board in relation to allowing municipally owned distributors to enter into higher risk ventures with potential consequences to rates paid by rate payers, with consideration of unfair competition between private distributors and municipally owned distributors, cross-subsidization by municipally owned distributors of their activities and costs between their regulated and unregulated activities, economic efficiency and cost effectiveness in the electricity industry as a whole.

Tab 12 Graywood Investments Ltd. v Ontario (Energy Board) [2005] O.J. No. 345 (Div. Ct.)

THE BOARD'S EXPERTISE

21. Furthermore, the Board has specialized expertise on the electricity industry which makes it the most appropriate body to determine such matters. The Divisional Court has recognized the high level of expertise the Board brings to its mandate. Given the detrimental market effects that may arise from the decision that the Board makes, it is of particular importance that this matter is heard in front of the most appropriate body that is able to best appreciate the evidence and the contextual factors and circumstances involved to make an informed decision.

Tab 13 Consumer's Gas Co. v Ontario (Energy Board) [2001] O.J. No. 5024 (Div. Ct.)

22. The deference that is therefore necessarily afforded to the Board as a result of its unique expertise has been emphasized by the courts as follows:

> "In this case, the expertise of the tribunal in regulatory matters is unquestioned. This is a highly specialized and technical area of expertise.
>
> It is also recognized that the legislation involves economic regulation of the energy resources, including setting prices for energy which are fair to the distributors and suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy. That is why courts have accorded considerable deference to the Board..."

Tab 14 **Enbridge Gas Distribution Inc. v Ontario (Energy Board)**
[2005] O.J. No. 756 (Div. Ct.)

BULLETINS BY BOARD STAFF

23. Board staff has offered its opinion in respect of these important matters in Bulletins with a disclaimer that their opinions are not representative of Board decisions. It is submitted that this creates ambiguity which ought to be resolved in a properly supported Board decision.

ORDER REQUESTED

24. The intervenor Powerline requests that the Board hear its application together with that of Langley Utilities as part of the Board's powers pursuant to Section 19(1) of the *Ontario Energy Board Act*. In the alternative, an order is sought that the Board hear the application of Powerline and Langley Utilities on the Board's own motion pursuant to Section 19(4) of the *Ontario Energy Board Act*.

25. The intervenor Powerline submits that there should be no award of costs payable by it with respect to this hearing nor any subsequent hearings based on the importance of these issues to the public and to the Board.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of December, 2011 at Cobourg, Ontario.

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TAB 2

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BY E-MAIL ONLY

E-Mail: sherwoodhunt@bellnet.ca

October 13, 2009

Mr. James T. Hunt
James T. Hunt Law Office
279 Spring Street
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K9A 2V7

Dear Mr. Hunt:

Re: Web Submission in Relation to Powerline Plus Ltd. vs Enersource Corporation, Enersource Hydro Mississauga Inc. and the Corporation of the City of Brampton

This will acknowledge receipt of your web submission on September 18, 2009 in which you seek a decision of the Ontario Energy Board (the "Board"). Specifically, you state that a court has ordered the stay of the subject action pending a decision of the Board, including any appeal therefrom, as to whether the services contemplated under the Corporation of the City of Brampton contract 2008/087 are permitted business activities which an affiliate of a municipally owned electricity distributor can lawfully carry on under section 73 of the *Ontario Energy Board Act, 1998* (the "Act").

It is not clear that the situation described in your web submission necessarily constitutes a power or duty assigned to the Board under the Act or any other act. In order to assist the Board in this regard, would you please provide copies of the following documents:

Statement of Claim;
Statement of Defence;
Applicant's Motion Record;
Respondent's Motion Record; and
Judge's Reasons and Order.

Electronic copies or paper copies may be submitted to me directly. Please feel free to contact me if you have any questions relating to this matter.

Yours truly,

Original signed by B. Robertson

Barbara Robertson, Manager
Retail Markets and Compliance Management
Regulatory Policy & Compliance

Phone: 416-440-7718
E-Mail: barbara.robertson@oeb.gov.on.ca

TAB 3

JAMES T. HUNT
BARRISTER & SOLICITOR

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October 22, 2009

Barbara Robertson, Manager
Retail Markets and Compliance Management
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P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

Dear Ms. Robertson:

Re: Powerline Plus Ltd. v Enersource Corporation, Enersource Hydro Mississauga Inc. and the Corporation of the City of Brampton

---

Further to your letter dated October 13, 2009, please be advised that the correct date our web submission was sent to you was September 10, 2009.

We enclose the following materials:

1. Statement of Claim
2. Motion Record of the Defendants
3. Factum of the Defendants
4. Factum of the Respondent
5. Addendum to the Factum of the Respondent
6. Index to Book of Authorities
7. Index to Addendum to Book of Authorities
8. Judge's Reasons and Order

Yours very truly,

James T. Hunt

JTH:jl
encl.

TAB 4

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
SCHEDULE B

Consolidation Period: From June 6, 2011 to the e-Laws currency date.

Last amendment: 2011, c. 9, Sched. 27, s. 34.

PART I
GENERAL

Board objectives, electricity

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1.

Facilitation of integrated power system plans

(2) In exercising its powers and performing its duties under this or any other Act in relation to electricity, the Board shall facilitate the implementation of all integrated power system plans approved under the *Electricity Act, 1998*. 2004, c. 23, Sched. B, s. 1.

Refrain from exercising power

29. (1) On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest. 1998, c. 15, Sched. B, s. 29 (1).

Scope

(2) Subsection (1) applies to the exercise of any power or the performance of any duty of the Board in relation to,

(a) any matter before the Board;

(b) any licensee;

(c) any person who is subject to this Act;

(d) any person selling, transmitting, distributing or storing gas; or

(e) any product or class of products supplied or service or class of services rendered within the province by a licensee or a person who is subject to this Act. 1998, c. 15, Sched. B, s. 29 (2).

Where determination made

(3) For greater certainty, where the Board makes a determination to refrain in whole or in part from the exercise of any power or the performance of any duty under this Act, and does so refrain, nothing in this Act limits the application of the *Competition Act* (Canada) to those matters with respect to which the Board refrains. 1998, c. 15, Sched. B, s. 29 (3).

Notice

(4) Where the Board makes a determination under this section, it shall promptly give notice of that fact to the Minister. 1998, c. 15, Sched. B, s. 29 (4).

Municipally-owned distributors

73. (1) If one or more municipal corporations own, directly or indirectly, voting securities carrying more than 50 per cent of the voting rights attached to all voting securities of a corporation that is a distributor, the distributor's affiliates shall not carry on any business activity other than the following:

1. Transmitting or distributing electricity.
2. Owning or operating a generation facility that was transferred to the distributor pursuant to Part XI of the *Electricity Act, 1998* or for which the approval of the Board was obtained under section 82 or for which the Board did not issue a notice of review in accordance with section 80.
3. Retailing electricity.
4. Distributing or retailing gas or any other energy product which is carried through pipes or wires to the user.
5. Business activities that develop or enhance the ability of the distributor or any of its affiliates to carry on any of the activities described in paragraph 1, 3 or 4.
6. Business activities the principal purpose of which is to use more effectively the assets of the distributor or an affiliate of the distributor, including providing meter installation and reading services, providing billing services and carrying on activities authorized under section 42 of the *Electricity Act, 1998*.
7. Managing or operating, on behalf of a municipal corporation which owns shares in the distributor, the provision of a public utility as defined in section 1 of the *Public Utilities Act* or sewage services.
8. Renting or selling hot water heaters.
9. Providing services related to the promotion of energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources. 1998, c. 15, Sched. B, s. 73 (1); 2002, c. 23, s. 4 (9).

Limitation

(2) In acting under paragraph 7 of subsection (1), the distributor's affiliate shall not own or lease any works, pipes or other machinery or equipment used in the manufacture, processing or distribution of a public utility or in the provision of sewage services. 1998, c. 15, Sched. B, s. 73 (2).

Municipal corporation

(3) Subsection (1) does not restrict the activities of a municipal corporation. 1998, c. 15, Sched. B, s. 73 (3).

TAB 5

16.A tribunal may, in making its decision in any proceeding,

(a) take notice of facts that may be judicially noticed; and

(b) take notice of any generally recognized scientific or technical facts, information or opinions within its scientific or specialized knowledge. R.S.O. 1990, c. S.22, s. 16.

Interim decisions and orders

16.1(1)A tribunal may make interim decisions and orders.

Conditions

(2)A tribunal may impose conditions on an interim decision or order.

Reasons

(3)An interim decision or order need not be accompanied by reasons. 1994, c. 27, s. 56 (32).

Time frames

16.2 A tribunal shall establish guidelines setting out the usual time frame for completing proceedings that come before the tribunal and for completing the procedural steps within those proceedings. 1999, c. 12, Sched. B, s. 16 (6).

Decision; interest

Decision

17.(1)A tribunal shall give its final decision and order, if any, in any proceeding in writing and shall give reasons in writing therefor if requested by a party. R.S.O. 1990, c. S.22, s. 17; 1993, c. 27, Sched.

Interest

(2)A tribunal that makes an order for the payment of money shall set out in the order the principal sum, and if interest is payable, the rate of interest and the date from which it is to be calculated. 1994, c. 27, s. 56 (33).

Costs

17.1 (1) Subject to subsection (2), a tribunal may, in the circumstances set out in rules made under subsection (4), order a party to pay all or part of another party's costs in a proceeding. 2006, c. 19, Sched. B, s. 21 (2).

Exception

(2) A tribunal shall not make an order to pay costs under this section unless,

(a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and

(b) the tribunal has made rules under subsection (4). 2006, c. 19, Sched. B, s. 21 (2).

Amount of costs

(3) The amount of the costs ordered under this section shall be determined in accordance with the rules made under subsection (4). 2006, c. 19, Sched. B, s. 21 (2).

Rules

(4) A tribunal may make rules with respect to,

(a) the ordering of costs;

(b) the circumstances in which costs may be ordered; and

TAB 6

Court File No. 58882/08

Tuesday, August 18, 2009

The Honourable Mr. Justice Shaughnessy

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

POWERLINE PLUS LTD.

Plaintiff

- and -

ENERSOURCE CORPORATION

- and -

ENERSOURCE HYDRO MISSISSAUGA INC.

- and -

ENERSOURCE HYDRO MISSISSAUGA SERVICES INC.

- and -

THE CORPORATION OF THE CITY OF BRAMPTON

Defendants

ORDER

THIS MOTION, made by the Defendants, for an Order striking out the Statement of Claim, was read this day, at Whitby.

ON READING the Notice of Motion and the Consent of the parties, filed,

1. THIS COURT ORDERS that this action be stayed pending a decision by the Ontario Energy Board (the "OEB"), including any appeal(s) therefrom, on whether the services contemplated under The Corporation of the City of Brampton contract no. 2008-087 are permitted business activities which an affiliate of a municipally-owned electricity distributor

can lawfully carry on under section 73 of the *Ontario Energy Board Act, 1998;* S.O. 1998, c. 15 Schedule B.

2. THIS COURT ORDERS that the Plaintiff, Powerline Plus Ltd., shall file an application with the OEB within thirty (30) days of the date of this Order.

J B Thompson J

ENTERED AT WHITBY

on August 18, 2009

by

POWERLINE PLUS LTD. and **ENERSOURCE CORPORATION et al.**		Court File No: 58882/08
Plaintiff	Defendants	

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Whitby

ORDER

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Solicitors for the Defendants/Moving Parties

TAB 7

Re

Morgan et al. and Windsor Roman Catholic Separate School Board

[1979] O.J. No. 4542

29 O.R. (2d) 100

112 D.L.R. (3d) 163

Ontario
High Court of Justice
Divisional Court
Griffiths, Krever

and Eberle, JJ.

October 23, 1979.

W. W. Markle, Q.C., for applicants.

R. C. Filion, for respondent.

The judgment of the Court was delivered by

1 EBERLE, J.:-- These three applications were heard together arising as they do in similar, if not identical, circumstances. The application in each instance is for an order in the nature of mandamus requiring the Boards of Reference granted by the Minister of Education to consider and determine whether or not a contract of employment as defined under s. 232 and following of the Education Act, 1974 (Ont.), c. 109, was made between each of the applicants and the respondent and for declaratory relief in connection therewith.

2 The factual background is this. Each of the applicants was a teacher in a Roman Catholic high school in Windsor teaching partly in grades 9 and 10 and partly in grades 11 to 13. For grades 9 and 10 the school was supported by public funds, and was under the control of the respondent, the Windsor Roman Catholic Separate School Board, which is a "board" under the Education Act, 1974 and within the definition of "board" in s. 1(1), para. 3 of that Act. Grades 11 to 13 in the school are under the authority of a private body, the Diocesan Roman Catholic High School Board of Metropolitan Windsor (which I will hereinafter refer to as "the Metro Board" and I will refer to the Windsor Roman Catholic Separate School Board as "the Windsor Board"). The Metro Board is privately funded and is not within the definition of "board" contained in s. 1(1), para. 3 of the Education Act, 1974.

3 I believe that each of the applicants had a contract in writing with the Metro Board, but what is

important in this case is that none of them had any contract in writing nor any express oral contract with the Windsor Board as a permanent teacher. However, since each taught partly in grades 9 and 10 and partly in grades 11 to 13 the salaries of the three applicants were ultimately shared by the two boards in the same proportion as their teaching duties were shared. In anything I say in these reasons I do not intend to make any finding nor express any opinion whether or not the applicants have or have not any contract with the Windsor Board. The Metro Board terminated its contracts with the applicants. I understand that an arbitration board was agreed to by the parties to deal with questions arising out of that termination. The Windsor Board did not take any steps towards a termination of any contracts with the applicants, but declined to provide teaching assignments for them. They accordingly applied to the Minister under the Education Act, 1974, s. 233(3), for the appointment of Boards of Reference and the Minister granted Boards accordingly.

4 The applicants' position is, first, they have contracts with the Windsor Board. Second, those contracts are still in existence because they have not been terminated by the Windsor Board in accordance with the Education Act, 1974 and the Regulations. A lengthy hearing took place, witnesses were examined and cross-examined on both sides, and submissions were made, the hearing consuming several days. Much of the evidence dealt with the issue whether or not the applicants had permanent teachers' contracts with the Windsor Board, arising out of a course of conduct, statute or any other basis. In its closing argument, for the first time, the respondent Board challenged the jurisdiction of the Board of Reference to deal with the question of the existence or non-existence of a contract of employment between the applicants and the Windsor Board. The decision of the Boards of Reference is as follows:

> It is agreed by the parties that no contract of employment was made, either orally or in writing. The teacher's position is that by the course of conduct of the board a contract exists in the statutory form. The board's position is that the course of conduct of the board does not give rise to any contract. If we find that any contract was made, we can proceed to report in the terms required by s. 238 of the Education Act, 1974. If we find that no contract was made, we are unable to report in the terms of s. 238 of the Act.
>
> Under those circumstances, before making any finding on the evidence, the possibility exists that we will not be able to fulfil our statutory duty under s. 238. We are therefore unable to report until our jurisdiction is judicially determined.

5 In my view, this decision amounts to a refusal by the Board to enter upon any consideration of or to make any decision concerning its jurisdiction to decide the question of the existence or non-existence of a permanent teacher's contract between the applicants and the Windsor Board. The relevant provisions of the Act pertaining to Boards of Reference commence with s. 232 of the Act.

> 232. In sections 233 to 242,
>
> (a) "contract" means a contract of employment between a teacher and a board;
>
> (b) "employed" means employed as a permanent teacher by a board;
>
> (c) "judge" means a judge of a county or district court;
>
> (d) "teacher" means a person qualified to teach in an elementary or secondary school and employed by a board on the terms and conditions contained in the form of contract prescribed for a permanent teacher.

233(1) The dismissal of a teacher, or the termination of the contract of a teacher, by a board shall be by notice in writing, which shall state the reasons therefor, in accordance with the terms of the contract.

(2) Where a teacher is employed by a board, the termination of the contract by the teacher shall be by notice in writing in accordance with the terms of the contract.

(3) Where a teacher is dismissed or the contract of a teacher is terminated by the board or the teacher, the teacher or board if not in agreement with the dismissal or termination may at any time within twenty-one days after receiving the notice referred to in subsection 1 or 2, as the case may be, apply in writing by registered letter to the Minister for a Board of Reference, stating the disagreement.

(4) The applicant shall send a copy of the application by registered mail to the other party to the disagreement on the same day as the application is sent to the Minister.

. . . . .

235(1) Upon receipt of an application for a Board of Reference, the Minister shall cause notice of the application to be sent by registered mail to the other party to the disagreement and shall within thirty days of sending the notice inquire into the disagreement and shall, within the same time,

(a) refuse to grant the Board of Reference; or

(b) grant the Board of Reference and appoint a judge to act as chairman thereof.

Following that subsection are a number of subsections dealing with procedural requirements which are not now important, except for s-s. (7), which I set out here in full:

235(7) Where the Minister grants a Board of Reference, the applicant shall be deemed to have met the conditions precedent to the granting of a Board of Reference.

As well, reference must be made to ss. 237 and 238, s-s. (1):

237. The Board of Reference shall inquire into the matter in dispute and for such purposes the chairman has the powers of a commission under Part II of The Public Inquiries Act, 1971, which Part applies to such inquiry as if it were an inquiry under that Act.

238(1) A Board of Reference shall direct the continuance of the contract or the discontinuance of the contract.

In support of their position on the contract the applicants also rely on s. 224:

224(1) A full-time or part-time teacher who is employed by a board and who is not an occasional teacher shall be employed as a permanent or a probationary teacher.

(2) A memorandum of every contract of employment between a board and a permanent teacher or a probationary teacher shall be made in writing in the form of

> contract prescribed by the regulations, signed by the parties, sealed with the seal of the board and executed before the teacher enters upon his duties, but if for any reason such memorandum is not so made, or has not been amended to incorporate any change made in the form of contract so prescribed, every contract shall be deemed to include the terms and conditions contained in the form of contract prescribed for a permanent teacher.

6 I turn now to the central issue argued before us, namely, whether the Board of Reference had jurisdiction to consider the question of its own jurisdiction, and specifically, to consider and determine whether the applicants had or had not a permanent teachers' contract with the Windsor Board, before going on to deal with any other issue that might properly be before them. It appears that no authorities were cited to the Boards of Reference in support of the Windsor Board's position that the Board of Reference could not make a decision as to its own jurisdiction, nor were any authorities cited to us. The Windsor Board's argument has the effect of leaving a substantial gap in the legislation and would appear to fail to carry out the remedial intent of the provisions in the statute for Boards of Reference as a simple and expeditious method of dealing with certain disputes. Nevertheless, the provisions of the Act and the relevant law must be given effect to. By way of authorities we were referred to Re Carpenters' District Council of Toronto & Vicinity and Engineering Structures & Components, a decision of the Divisional Court (1978), 19 O.R. (2d) 445, 85 D.L.R. (3d) 443, 19 L.A.C. (2d) 432n, in which the Court held [at p. 448 O.R., p. 446 D.L.R.], with respect to a board of arbitration established to deal with a labour grievance, that such Board had:

> ... jurisdiction in this matter to determine whether a collective agreement exists and then, if they decide that one does exist, to proceed and interpret it in relation to the problem raised before the Board.

In coming to that conclusion the Court pointed out at p. 447 O.R., p. 445 D.L.R.:

> It is implicit in every case where boards of arbitration decide questions under collective agreements that collective agreements are in existence. Usually, of course, the parties agree to this and the issue is never even raised. If, however, one party could be able, by arguing that there is no collective agreement in existence, to prevent the board of arbitration from proceeding, the arbitration process would be undermined seriously. If this were permitted, either party could allege, perhaps frivolously, that an agreement is illegal or that the parties are not covered, or that the agreement was not authorized, and prevent the matter proceeding to arbitration, thereby forcing the other party to apply to the Ontario Labour Relations Board under s. 112a of the Act. This could delay the matter and increase the cost of resolving these disputes, something we believe should be avoided, if possible. Counsel for the company admitted that this was legally the case, although, practically, he thought that the Board might choose to make a preliminary determination where the question was merely raised in a frivolous way.

7 In the reasons in that case, reference was also made to the Supreme Court of Canada decision, Re Bradburn et al. and Wentworth Arms Hotel Ltd. et al., [1979] 1 S.C.R. 846, 94 D.L.R. (3d) 161, 79 C.L.L.C. 15,136. There a question arose as to the continued existence or not of a collective agreement, and the arbitration board's jurisdiction to deal with that question was challenged. In his reasons for judgment Chief Justice Laskin noted at p. 850 S.C.R., p. 163 D.L.R.:

> The parties here provided however, in their collective agreement that arbitrability should itself be within the jurisdiction of a board of arbitration, as indeed is directed

> by s. 37(1) of The Labour Relations Act. I consider the question of the duration or subsistence of the collective agreement under its termination terms to be subsumed under the issue of arbitrability confided to the board.

The two factors he refers to there, namely, the provision of the Labour Relations Act and the term of the agreement, are not present here, but the Chief Justice went on in the next sentence:

> It may be that prior to the enactment of s. 37(1) an issue of arbitrability, although one that a board could properly determine (lest it be stultified by a mere objection to its right to proceed), was fully reviewable as raising a jurisdictional question ...

As I read these words it appears to me that the Chief Justice is suggesting that a tribunal has authority to deal with a challenge to its own jurisdiction apart from any special statutory provisions and gives a reason for that view which closely resembles the reasoning in the Carpenters' case.

8 The Chief Justice's decision in Bradburn and Wentworth Arms Hotel is not the majority decision, which is to be found in the reasons of Mr. Justice Estey at pp. 854-5 S.C.R., p. 167 D.L.R. He deals with the matter this way:

> The threshhold problem which reared its head at each level on which this debate has occurred is whether or not an arbitration board may properly interpret a collective agreement so as to determine whether the agreement was in effect at the time of the arbitration; in other words to determine whether or not the Board itself was properly constituted and was acting within the contractually conferred jurisdiction. Counsel for the appellant, in fairness to him, did no more than present the argument which I find sufficiently answered by the terms of s. 37(1) of The Labour Relations Act [R.S.O. 1970, c. 232] which make all matters subject to arbitration including "any question as to whether a matter is arbitrable". There is no other practical solution to this question because if the Board cannot determine whether the agreement continues in effect and hence its own proper existence, it is difficult to find the jurisdiction elsewhere. Of course if the Board is wrong in law as to the pendence of the collective agreement, its decision is a nullity, and thus within the reach of a court of law.

In this passage, Mr. Justice Estey considers the matter in relation to the special statutory provisions applicable to that case, but I point out that he stresses the practicalities of the situation, namely, how else can a board's jurisdiction be determined if not initially by the board itself?

9 Finally, I wish to turn to Re Ontario Labour Relations Board; Bradley et al. v. Canadian General Electric Co. Ltd., [1957] O.R. 316, 8 D.L.R. (2d) 65, and particularly at pp. 334-5 O.R., p. 81 D.L.R., where in dealing with the jurisdiction of an inferior tribunal, Roach, J.A., for the Court says:

> When the jurisdiction of an inferior tribunal to decide what I will call the main question before it, depends upon a collateral matter it must, of course, decide that preliminary or collateral matter. It can decide it only on evidence. If there is no evidence then the existence of the facts on which the tribunal's jurisdiction to proceed further depends, has not been established and the tribunal is without jurisdiction to proceed further. If there is evidence then the tribunal weighs it and concludes that the facts on which its further jurisdiction depends either have or have not been proven to exist.

This passage makes it clear that an inferior tribunal must, as a preliminary to deciding the main question before it, make a decision upon a collateral or preliminary matter affecting its jurisdiction.

10 For these reasons it is my conclusion that the Boards of Reference, in these matters now before us, had jurisdiction to decide any question as to their own jurisdiction, and more specifically, that they had jurisdiction to determine whether or not a contract in the terms of a permanent teacher's contract, or any contract, existed between the applicants and the Windsor Board. The relief sought by the applicants is for an order referring the matter back to the Board of Reference to consider and determine whether the applicants are teachers under contract with the Windsor Board and an order to this effect accordingly will go. The parties were in agreement that costs should follow the event; accordingly, the applicants are entitled to their costs to be taxed.

Judgment accordingly.

TAB 8

Re

Canadian Union of Public Employees Local 1325 and Board of Education for the City of Toronto et al.

[1976] O.J. No. 2340

14 O.R. (2d) 481

74 D.L.R. (3d) 96

Ontario
High Court of Justice
Divisional Court

O'driscoll, O'leary, and Cory, JJ.

October 27, 1976

I. Scott, Q.C., for applicant.

C.G. Riggs, for respondents.

The judgment of the Court was delivered orally by

1 **O'LEARY, J.**:-- This is an application by the Canadian Union of Public Employees Local 1325 for judicial review of the award of a board of arbitration, composed of the respondents, Palmer, Sanderson and Brodie, dated May 14, 1975, and for an order quashing the same or remitting it to the respondents for further hearing.

2 The union and the respondents, the Board of Education for the City of Toronto (hereinafter referred to as the Employer) are parties to a collective agreement dated August 21, 1974.

3 Pursuant to the collective agreement, the union filed a grievance on May 9, 1974. The grievance was in the following terms:

> The Union grieves that the Board of Education for the City of Toronto is not deducting or contributing to the Ontario Municipal Employees' Retirement System in accordance with the terms of that System. Since this System is covered by the Collective Agreement the Union requests that the Board contribute and deduct from the employees in accordance with the System effective the date of this grievance.

4 The grievance was carried to arbitration pursuant to the provisions of the collective agreement and on May 14, 1975, 9 L.A.C. (2d) 184, the majority of the board of arbitration released its award

dismissing the grievance. The respondent Brodie dissented.

5 It was agreed that the parties had provided in their collective agreement since 1965 for retirement benefits for employees under the Ontario Municipal Employees' Retirement System. This system or pension scheme provided for in the said Act called for certain sums of money to be provided by both parties. The issue raised by the grievance was whether the employer had paid the amounts required by the system. This in turn depended on whether "earnings" as defined in s. 1(e) [re-enacted 1972, c. 102, s. 1] of the Act upon which the payments were calculated included fringe benefits. The Ontario Municipal Employees Retirement System Act, R.S.O. 1970, c. 324, and amendments thereto, states:

> 1. In this Act,
>
> (e) "earnings", in the case of an employee who is a member, means the salary or wages paid to him by an employer including the value of any perquisites received from an employer ...

6 The collective agreement in question contains the following provision, para. 19.02:

> 19.02 The pensions schemes at present in force shall be continued.

7 It is agreed, as has already been stated, that the pension scheme then in force was the scheme provided for in the said Act and there can be no doubt that it was the scheme as provided for in the Act that was to be continued.

8 Certain sections of the said Act and Regulations quoted below are relevant to our consideration:

> 1. ...
>
> . . . . .
>
> (e) "earnings", in the case of an employee who is a member, means the salary or wages paid to him by an employer including the value of any perquisites received from an employer and, in the case of a councillor who is a member, means any moneys paid to him for his services as a councillor under The Municipal Act or under any Act establishing a metropolitan, regional or district municipality;
>
> . . . . .
>
> 3(1) The Ontario Municipal Employees Retirement Board is continued as a corporation, and the management and administration of the System are vested in the Board.
>
> . . . . .
>
> (3) The Board shall appoint or cause to be appointed such officers, employees, legally qualified medical practitioners and advisers as are necessary to carry out the responsibilities of the Board and shall appoint an auditor and an actuary and determine the remuneration of all such persons. [rep. & sub. 1974, c. 102, s. 1]
>
> . . . . .

(5b) The Board may make rules and regulations for the management and administration of the System and may assign to the persons mentioned in subsection 3 such of its duties as it decides are necessary or desirable. [rep. & sub. ibid.]

. . . . .

9. The contributions of the members shall be as prescribed in the regulations. 10. The contributions of the employers who participate in the System shall be such an amount as is required, in addition to the contributions of the members and the interest earned by the Fund, to provide for the payment of the benefits and the expenses under the regulations.

. . . . .

12. Any sum the payment of which has not been made by an employer as required in the regulations is a debt recoverable from the employer by the Board in a court of competent jurisdiction.

13. The Lieutenant Governor in Council may make regulations,

. . . . .

(b) governing the operation and administration of the Board including the powers and duties of the officers and employees of the Board;

. . . . .

(f) providing for the participation of employers and for the membership of employees and councillors in the System, and the terms and conditions upon which such participation and membership are permitted; [am. 1972, c. 102, s. 4 (1)]

(g) prescribing the rates of contributions of the members and the principles for the determination of the rates of contributions of the employers;

. . . . .

(l) prescribing the duties of employers and of members with respect to the System;

. . . . .

(n) respecting any matter necessary or advisable to carry out effectively the intent and purpose of this Act.

R.R.0. 1970, Reg. 638 [since rep. & sub. O. Reg. 456/75; further am. O. Reg. 1035/75]:

1. In this Regulation,

. . . . .

(d) "contributory earnings" means the earnings of a member on which the contributions under section 9 have been made and have not been refunded.

. . . . .

4. The actuary shall, at the request of the secretary-treasurer, prepare and advise on whatever actuarial calculations, schedules or tables are necessary for the proper administration of the System.

. . . . .

9(1) Every member shall contribute to the Fund by payroll deductions a percentage of his earnings while he is an employee or councillor of an employer who participates in the System. [rep. & sub. O. Reg. 419/72, s. 6]

(2) The amount of contributions payable by a member under subsection 1 in respect of his earnings in any pay period shall in the case of a member whose normal retirement age is,

(a) 65 years, be 5 1/2 per cent of his earnings, in the pay period reduced by 1 1/2 per cent of that portion of his earnings in the pay period which if computed on an annual basis would not exceed the Year's Maximum Pensionable Earnings as defined in the Canada Pension Plan, or
(b) 60 years, be 6 1/2 per cent of his earnings, in the pay period reduced by 1 1/2 per cent of that portion of his earnings in the pay period which if computed on an annual basis would not exceed the Year's Maximum Pensionable Earnings as defined in the Canada Pension Plan. [rep. & sub. O. Reg. 208/71, s. 1]

. . . . .

10(1) The Board, on the advice of the actuary, shall from time to time fix,

(a) the rates to be used to calculate the amount of contributions to be paid into the Fund by an employer in respect of the earnings of members ... [rep. & sub. O. Reg. 555/73, s. 1]

(2) The rates fixed under this section shall be a percentage of the earnings of the members after a date prescribed by the Board and shall be basic rates applicable to all employers,

(a) in respect of members whose normal retirement age is sixty-five years; and
(b) in respect of members whose normal retirement age is sixty years.

. . . . .

(5) The contributions to be paid by the employer to the Fund each month in respect of rates fixed under this section shall be determined by multiplying the monthly earnings of the members by the rates fixed by the Board under this section. [rep. & sub. O. Reg. 419/72, s. 7]

. . . . .

(7) The rates under this section shall be such that, in the opinion of the actuary, the

contributions to be paid by the employers, together with,

(a) the special contributions to be paid under this section;
(b) the contributions to be paid by the members under section 9; and
(c) the interest earned on the investments of the Fund,

shall provide for the payment of the benefits and the expenses under this Regulation.

. . . . .

12(1) Every member who retires on or after his normal retirement date is entitled to receive a pension in respect of his contributory earnings.

(2) A pension under this section is payable to a member for his life commencing on the first day of the month next following the month of his retirement.

(3) The annual amount of pension payable to a member under this section is,

(a) 2 per cent of his contributory earnings before the 1st day of January, 1968 and 2.2 percent of his contributory earnings on or after the 1st day of January, 1968, reduced in the same proportion that the contributions of the member are reduced under section 9;
(b) 10 per cent of the amount of pension calculated under clause a in respect of the contributory earnings of the member before the 1st day of January, 1971; [rep. & sub. O. Reg. 636/73, s. 1; further am. O. Reg. 722/ 74, s. 3]

9 It appears from the sections of the Act and the Regulations I have just quoted that the pension a retired employee receives is related to the size of the earnings on which his contribution to the scheme or Fund has been calculated. It is further evident that the contribution the employer is to make to the Fund as governed by s. 10(5) of the Regulation is a percentage of the monthly earnings of an employee. The amount of the employee's "earnings" then affects not only the amount he is to receive by way of pension but also the amount both he and the employer are to contribute to the Fund.

Section 1(e) of the Act defines earnings as "the salary or wages paid to him by an employer including the value of any perequisites received from an employer".

10 It is common ground that in the matter before us the employer is making deductions from the employees for the pension scheme and is itself paying into the Fund a percentage of salary or wages only, and is not paying in or deducting from the employee a percentage of the value of any perquisites received from the employer.

11 The board of arbitration determined that paras. 18.03 and 19.02 of the collective agreement incorporated into the collective agreement the provisions of the Ontario Municipal Employees Retirement System established pursuant to the Ontario Municipal Employees Retirement System Act and Regulations. The board, however, went on to hold notwithstanding the incorporation by reference into the collective agreement of the Ontario Municipal Employees Retirement System that it was without jurisdiction to determine whether the employer had made the appropriate contribution fixed by that System.

12 The board in effect concluded that it was without jurisdiction to determine whether the employer had properly determined the meaning of "earnings" in calculating the contributions made by it to the

Ontario Municipal Employees Retirement System.

13 If the board of arbitration was to determine or settle the grievance submitted to it for its determination it could only do so by looking at and interpreting the provisions of the Ontario Municipal Employees Retirement Systems Act and the Regulations made under the Act.

14 In our view it was empowered to determine the meaning of the Act and Regulations on two bases. First, by paras. 19.02 and 18.03 of the collective agreement, the scheme propounded by the Act became part of the collective agreement. Paragraph 18.03 of the collective agreement reads as follows:

> 18.03 The Board will give a copy of this Agreement, and a copy of each fringe benefit plan which forms part of the Agreement to each employee within sixty (60) days after the Agreement is signed.

15 If the board was to determine the meaning of the collective agreement it had to determine the meaning of the Act which was incorporated into it. Secondly, in our view, even if it could be said that the Ontario Municipal Employees Retirement Systems Act is not a projection of or incorporated into the terms of the collective agreement, at the very least its terms specifically govern the pension scheme contemplated in the collective agreement. As such it is a public enactment that the board of arbitration had to interpret in order to determine the terms of the pension plan set up in the collective agreement. In that regard I refer to the words of Chief Justice Laskin in McLeod et al. v. Egan et al., [1975] 1 S.C.R. 517 at pp. 518-9, 46 D.L.R. (3d) 150 at pp. 151-2, 2 N.R. 443:

> Although the issue before the arbitrator arose by virtue of a grievance under a collective agreement, it became necessary for him to go outside the collective agreement and to construe and apply a statute which was not a projection of the collective bargaining relations of the parties but a general public enactment of the superior provincial Legislature. On such a matter, there can be no policy of curial deference to the adjudication of an arbitrator, chosen by the parties or in accordance with their prescriptions, who interprets a document which is in language to which they have subscribed as a domestic charter to govern their relationship.
>
> In so far as Re Ford Moter Co. of Canada Ltd. and Int'l Union, United Automobile Workers of America et al. (1971), 22 D.L.R. (3d) 151, [1972] 1 O.R. 36 [71 C.L.L.C. 14, 088], would apply the same test to the construction of a statute called for in a grievance arbitration as to the construction of the collective agreement itself under which the grievance arises, I would hold it to be wrong. No doubt, a statute like a collective agreement or any other document may present difficulties of construction, may be ambiguous and may lend itself to two different constructions neither of which may be thought to be unreasonable. If that be the case, it none the less lies with the Court, and ultimately with this Court, to determine what meaning the statute should bear. That is not to say that an arbitrator, in the course of his duty, should refrain from construing a statute which is involved in the issues that have been brought before him. In my opinion he must construe, but at the risk of having his construction set aside by a Court as being wrong.

16 The arbitration board refused to decide the amount of the earnings on which the employer and the employees' share of contributions to the pension scheme are to be calculated, on the basis that to do so was beyond its jurisdiction.

17 The reasons of the board of arbitrators in declining jurisdiction are set out at pp. 9-11 of their

reasons [9 L.A.C. (2d) 184 at pp. 189-90] as follows:

> Nevertheless, this board would first note that we accept, as a general proposition, that arts. 18.03 and 19.02 do incorporate an insurance plan provided in pursuance to the Act and its regulation into this collective agreement. While art. 19.02 is vague on this point, we agree with counsel for the union, at least to a certain degree, that art. 18.03 does indicate that such a plan is incorporated into the collective agreement. Thus, this provision indicates that certain fringe benefit plans, a copy of which must be given to employees, "forms part of the Agreement." While it can be accepted that the lack of commas around the words "which forms part of the Agreement" may give rise to some ambiguity, either branch of this ambiguity at the very least suggests that such plans are constituted part of that agreement either by that or another of its clauses. Again, there can be no doubt that the benefit plan provided pursuant to the Act is one of the plans dealt with by the parties pursuant to art. 18.03. In the opinion of this board this meets the requirements of incorporation by reference. In our view, the issue here is certainty; the use of the words "explicit" in some awards cannot mean more than this.
>
> This finding, however, is not dispositive of this case. Thus, it must also be asked if this incorporation brings within the terms of the collective agreement s. 1(e) of the Act set out above in such a way as to allow this board of arbitration to make the ruling requested by the union, i.e., to give an expanded meaning to the word "earnings" and require the board to pay such additional sums of its own and employees' money to OMERS on this basis.
>
> After considering this aspect of the case, this board is of the opinion that the scope of the incorporation by reference of the various benefit plans, including OMERS, does not cover this request. An examination of the Act makes this quite clear. Thus, if one looks to the Act, s. 10 states that the contributions of participating employers shall be determined by regulations which can be made by the Lieutenant Governor in Council pursuant to s. 13 of that Act. Section 12 then states that:
>
> > "12. Any sum the payment of which has not been made by an employer as required in the regulations is a debt recoverable from the employer by the [Ontario Municipal Employees Retirement] Board in a court of competent jurisdiction."
>
> To this board, then, the union request appears incompatible with the very Act they are trying to incorporate by reference into the collective agreement governing us. In short, they are requesting us to make a decision, binding on the board, relating to the extent of their contributions. This conflicts with the specific provisions in the Act that say such amounts are to be determined in accordance with regulations created by the Lieutenant Governor in Council. Were this board to accept the role postulated for it by the union we would then potentially place the board in a position where our award required one course of action and OMERS another. Surely, in this case general legislation must override the private provisions of this collective agreement.

18 We feel there is no validity in the reasons given by the board in declining jurisdiction. It is not the extent or the amount of the contributions of the employer that is fixed by the Regulations, rather it is the percentage of earnings that is to be deducted from the employee and is to be paid by the employer that is fixed in the Regulations. The Regulations only say that that percentage is to be calculated on the

earnings of the employee and earnings are defined in the Act. The board of arbitrators were not being asked to insert their figure in place of the percentage stipulated for in the Regulations.

19 For the reasons given the dismissal of the grievance is set aside and the matter is to be remitted to the board of arbitrators to determine the earnings, including the value of any perquisites received from the employer on which the employer's contribution to the scheme and deductions from the earnings of employees for the scheme is to be based, such calculations to be made in the light of the reasons that we have just given.

20 The appellant will have its costs of this application.

Order accordingly.

TAB 9

Indexed as:

Ontario (Chicken Producers' Marketing Board) v. Canada (Chicken Marketing Agency) (T.D.)

The Ontario Chicken Producers' Marketing Board
(Applicant)
v.
The Canadian Chicken Marketing Agency (Respondent)

[1993] 1 F.C. 116

[1992] F.C.J. No. 929

Court File No. T-1346-92

Federal Court of Canada - Trial Division

McGillis J.

Heard: Toronto, August 18 and 19, 1992.
Judgment: Ottawa, October 14, 1992.

Federal Court jurisdiction -- Trial Division -- Application to quash application for judicial review of assessment of liquidated damages -- Canadian Chicken Marketing Agency established by Proclamation pursuant to Farm Products Marketing Agencies Act -- Federal-Provincial Agreement controlling production and marketing of chicken in Canada -- Amendment thereto requiring provincial boards to pay liquidated damages if quota exceeded and providing for final resolution of disputes by National Farm Products Marketing Council -- Agency assessing liquidated damages against Ontario Board -- Within Court's jurisdiction to review assessment -- Agency only having powers specifically accorded to it by Act or Proclamation -- Agreement to assess damages exceeded powers mandated by Parliament -- Agreement between federal and provincial governments not enforceable as private contract -- Agency acting pursuant to statutorily authorized Agreement, purporting to exercise jurisdiction by or under Act of Parliament -- Application for judicial review without first appealing to Council not premature -- Agreement cannot oust Court's jurisdiction to review jurisdictional issue.

Agriculture -- Canadian Chicken Marketing Agency established by Proclamation pursuant to Farm Products Marketing Agencies Act -- Assessing liquidated damages for overproduction against Ontario Chicken Producers' Marketing Board pursuant to amendment to Federal-Provincial Agreement -- Agency limited to powers specifically accorded by Act -- Assessment of liquidated damages exceeding Agency's jurisdiction.

This was an application to quash the Ontario Chicken Producers' Marketing Board's application for judicial review on the grounds either that the Court lacked jurisdiction or that the application was premature. The Canadian Chicken Marketing [page117] Agency was established by Proclamation pursuant to the Farm Products Marketing Agencies Act, which gave it various powers to enable it to perform its functions, but not the power to assess liquidated damages. It was created to ensure the

promotion of an effective chicken industry in Canada. To that end it entered into a federal-provincial agreement in 1978, which was amended in 1984 to provide that each provincial marketing board would ensure that the quantity of chicken produced in the province and sold did not exceed its yearly allocation, failing which the provincial board would pay liquidated damages to the Canadian Agency. The amendment also provided that the National Farm Products Marketing Council would finally resolve any disputes concerning liquidated damages. In 1991 the Canadian Agency assessed the Ontario Board with liquidated damages. The Ontario Board did not appeal the assessment to the Council, but applied to this Court for judicial review. The Canadian Agency submitted that the Court lacked jurisdiction to review its assessment which was made pursuant to the terms of the Federal-Provincial Agreement, a private contract, and not through the exercise of powers conferred by or under an Act of Parliament. Furthermore, the provision in the Agreement for the final resolution of disputes concerning the determination of liquidated damages required the Ontario Board to appeal and obtain a ruling from the Council on the liquidated damages assessment before bringing a judicial review application in the Federal Court. The Ontario Board submitted that the Court had jurisdiction pursuant to Federal Court Act, section 18.1. The Canadian Agency is a federal body created by Parliament, exercises jurisdiction conferred by or under an Act of Parliament, and cannot act beyond the scope of those powers. As to prematurity, the provision in the Agreement for resolution of disputes cannot oust the jurisdiction of the Court, particularly where jurisdictional error is alleged. The issues were whether the Canadian Agency, in assessing liquidated damages against the Ontario Board, exercised or purported to exercise jurisdiction or powers conferred by or under an Act of Parliament, and whether the application for judicial review was premature since the Ontario Board had not yet appealed the assessment to the Council.

Held, the application should be dismissed.

The imposition of liquidated damages under the terms of the Federal-Provincial Agreement was beyond the powers conferred on the Agency by or under the Act or Proclamation and was reviewable by this Court. The Canadian Agency, a creature of statute and proclamation, may exercise only those powers specifically accorded to it by the Act or Proclamation. In agreeing to assess liquidated damages against the provincial commodity boards, the Canadian Agency expanded its powers beyond those mandated to it by Parliament.

[page118]

Furthermore, an agreement negotiated between federal and provincial governments pursuant to the provisions of a statute is not an ordinary private contract but an agreement between governments. Such an agreement is not enforceable as a private contract. The Agreement was negotiated pursuant to section 31 of the Farm Products Marketing Agencies Act The parties acknowledged its legislative base in the recitals and the Agreement is replete with references to legislative authority. It therefore cannot be characterized as a private contract in order to oust the jurisdiction of the Court. Furthermore, the actions of the Canadian Agency were undertaken pursuant to the statutorily authorized amended Federal-Provincial Agreement. It purported to exercise jurisdiction by or under an Act of Parliament, as a result of which this Court had jurisdiction to entertain the application for judicial review.

The application for judicial review was not premature. Section 9 of the amended Federal-Provincial Agreement provided that the Council would provide the final resolution of the "determination" of liquidated damages. In other words, the Council must consider the appropriateness of the assessment of liquidated damages in the circumstances of the case on appeal. Nothing in section 9 purports to oust the jurisdiction of the Court to review the power of the Canadian Agency to impose liquidated damages. Even had it purported to do so, section 9 could not prevent the Court from conducting judicial review of

a jurisdictional issue.

Statutes and Regulations Judicially Considered

Canadian Chicken Marketing Agency Proclamation, SOR/79-158, Schedule, ss. 6(3), 11 (as am. by SOR/91-139, s. 7), 12 (as am. idem, s. 8).
Canadian Chicken Marketing Quota Regulations, SOR/79-559. Farm Products Marketing Act, R.S.O. 1990, c. F.9, s. 16.
Farm Products Marketing Agencies Act, S.C. 1970-71-72, c. 65 (now R.S.C., 1985, c. F-4), ss. 16(1), 17 (1),(2), 22, 31, 36, 37.
Federal Court Act, R.S.C., 1985, c. F-7, ss. 2 (as enacted by S.C. 1990, c. 8, s. 1), 18.1 (as am. idem, s. 5).
Federal-Provincial Agreement with respect to the Establishment of a Comprehensive Chicken Marketing Program in Canada, ss. 2, 3, 4, 5, 9.

Cases Judicially Considered

Referred to:
Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525; (1991), 83 D.L.R. (4th) 297; [1991] 6 W.W.R. 1; 58 B.C.L.R. (2d) 1; 127 N.R. 161.
Crevier v. Attorney General of Quebec et al, [1981] 2 S.C.R. 220; 127 D.L.R. (3d) 1; 38 N.R. 541.

[page119]

Authors Cited

Wade, Sir William. Administrative Law, 6th ed., Oxford: Clarendon Press, 1988.

APPLICATION to quash, for lack of jurisdiction in the Court or as premature, an application for judicial review of an assessment of liquidated damages. Application dismissed.

Counsel:

Morris Manning, Q.C. and Theresa R. Simone, for the applicant.
Francois Lemieux and Martha A. Healey, for the respondent.

Solicitors:

Manning & Simone, Toronto, for the Ontario Chicken Producers' Marketing Board.
Osler, Hoskin & Harcourt, Ottawa, for the Canadian Chicken Marketing Agency.

The following are the reasons for order rendered in English by

1 McGILLIS J.:-- The Ontario Chicken Producers' Marketing Board (the Ontario Board) brought an application for judicial review under section 18.1 of the Federal Court Act [R.S.C., 1985, c. F-7 (as enacted by S.C. 1990, c. 8, s. 5)] seeking writs of certiorari and prohibition and an injunction against the Canadian Chicken Marketing Agency (the Canadian Agency). The Canadian Agency then moved to

quash the motion of the Ontario Board on the basis that the Court lacks jurisdiction or, alternatively, the application to the Court is premature. On the return date of the motions, only the application of the Canadian Agency concerning the jurisdiction of the Court was argued.

FACTS

2 The Ontario Board was created under the Farm Products Marketing Act, R.S.O. 1990, c. F.9 to administer the production and marketing of chickens in Ontario. The Canadian Agency was established in 1978 by Proclamation [Canadian Chicken Marketing [page120] Agency Proclamation, SOR/79-158] pursuant to the Farm Products Marketing Agencies Act, S.C.1970-71-72, c. 65, now R.S.C., 1985, c. F-4, to promote a strong, efficient and competitive chicken production and marketing industry in Canada.

3 In 1978, a federal-provincial agreement [Federal-Provincial Agreement with respect to the Establishment of a Comprehensive Chicken Marketing Program in Canada] establishing a comprehensive chicken marketing program in Canada was signed by the federal Minister of Agriculture, his provincial counterparts, the federal and provincial supervisory boards and the provincial marketing boards, with the exception of Alberta in all cases. The Proclamation creating the Canadian Agency was appended as schedule "A" to the Agreement and the Ontario Board was a signatory. The Agreement contained, among other things, various monitoring and enforcement provisions limiting the total quantity of chicken to be produced for sale and sold in the signatory provinces according to provincial allocations.

4 In 1984, the Federal-Provincial Agreement was amended to provide, among other things, that each provincial marketing board would ensure that the total quantity of chicken produced in the province and marketed in intraprovincial, interprovincial or export trade did not exceed its yearly allocation as determined from time to time by the Quota Regulations [Canadian Chicken Marketing Quota Regulations, SOR/79-559] of the Canadian Agency. Furthermore, if the provincial marketing board exceeded its yearly allocation, it would pay to the Canadian Agency liquidated damages as prescribed, from time to time, in its liquidated damages resolution. The National Farm Products Marketing Council (the Council) would resolve finally any disputes concerning liquidated damages. The amount assessed as liquidated damages by the Canadian Agency or the Council on appeal would constitute a debt payable to the Agency.

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5 Prior to 1990, the Canadian Agency calculated liquidated damages for the overproduction of chicken on an annual basis. In 1990, a new system of periodic penalties was introduced in the liquidated damages resolution and the Canadian Agency assessed liquidated damages against the Ontario Board in the amount of $928,321. The Ontario Board appealed the 1990 assessment to Council and argued, among other things, that the Canadian Agency had no jurisdiction to impose periodic or monetary penalties. Council rejected the jurisdictional argument of the Ontario Board and, following a consideration of the substantive arguments, dismissed the appeal. The Ontario Board paid the 1990 assessment as confirmed on appeal.

6 In 1991, the Canadian Agency applied the liquidated damages resolution and assessed the Ontario Board with liquidated damages in the amount of $1,713,172.

7 The Ontario Board did not appeal this assessment to Council, but rather applied to this Court for judicial review.

ISSUES

(i) Whether the Canadian Agency, in making its assessment of liquidated damages against the Ontario Board, exercised or purported to exercise jurisdiction or powers conferred by or under an Act of Parliament; and
(ii) whether the application of the Ontario Board is premature.

POSITION OF THE CANADIAN AGENCY

8 Counsel for the Canadian Agency submits that this Court has no jurisdiction to entertain the application of the Ontario Board on the basis that the Canadian Agency made its assessment of liquidated damages pursuant to the terms of the Federal-Provincial Agreement and not through the exercise or purported exercise of jurisdiction or powers conferred by or under an Act of Parliament. The Federal-Provincial [page122] Agreement entered into between the Canadian Agency and various provincial commodity boards, including the Ontario Board, is a private contract which has nothing to do with the governing statute, regulations or Proclamation. Indeed, the Canadian Agency does not have the statutory power to assess liquidated damages and, unless a provincial board is a party to the Agreement, it could not be obligated to pay such damages. Furthermore, the parties to the Agreement, including the Ontario Board, have agreed that the Council is the body to resolve finally disputes in relation to the determination of liquidated damages. Accordingly, the parties to the Agreement have established a complete contractual code for the assessment of liquidated damages and the resolution of disputes. Since the Ontario Board has not appealed its assessment to the Council, its application to the Court is premature.

9 Counsel conceded that the Canadian Agency is subject to judicial review by this Court where it exercises its regulatory powers. Furthermore, this Court would have jurisdiction to review the actions of the Canadian Agency under certain articles of the Federal-Provincial Agreement. However, the Court nevertheless lacks jurisdiction in relation to the liquidated damages resolution and only the provincial superior court possesses jurisdiction to review the actions of the Canadian Agency under this portion of the Agreement.

POSITION OF THE ONTARIO BOARD

10 Counsel for the Ontario Board submits that the Court has jurisdiction pursuant to section 18.1 of the Federal Court Act to grant the relief sought in its originating notice of motion. The Canadian Agency is a federal body created by Parliament which exercises or purports to exercise jurisdiction or powers conferred by or under an Act of Parliament. It cannot act beyond the scope of its limited powers without acting in excess of its jurisdiction. Furthermore, it cannot exercise powers purportedly conferred on it by consent or agreement, but rather is limited to the exercise of only those powers granted to it by Parliament. Since the Canadian Agency has no power under its governing statute, regulations or Proclamation [page123] to impose liquidated damages, its actions in purporting to impose such damages under the terms of the Federal-Provincial Agreement are reviewable by this Court. The statute itself provides penalties for those who breach its provisions and does not give any power to the Canadian Agency to make an agreement concerning penalties, damages or enforcement. The Canadian Agency cannot, by purporting to act under the Federal-Provincial Agreement, acquire an immunity from judicial review by this Court. Although the Canadian Agency has the power under its enabling Act to enter into a federal-provincial agreement, the statute contemplates that such agreements will be made solely for the purpose of permitting the Agency to perform functions ordinarily reserved to provincial boards in matters pertaining to intraprovincial trade. The Federal-Provincial Agreement cannot be properly characterized as a private contract. In fact, the recitals and terms of the Agreement recognize the existence of and necessity for a proper legislative and regulatory basis to authorize its provisions. If the

position of the Canadian Agency were adopted, it would permit a federal board to expand its jurisdiction by consent and would also enable it to escape review by this Court by alleging that its actions in a particular instance were not legislatively founded.

11 With respect to the argument concerning prematurity, the Ontario Board is not premature in bringing its application to the Court rather than appealing the assessment of liquidated damages to the Council. The existence of a term in the Agreement that the Council shall finally resolve the determination of liquidated damages cannot oust the jurisdiction of the Court, particularly where jurisdictional error is alleged. Furthermore, the Council is a signatory to the Agreement and has on two previous occasions, in 1986 and 1991, decided that the liquidated damages resolution has a statutory basis. It is not appropriate to ask a signatory to the Agreement who has twice ruled on the validity of the resolution to decide the matter again.

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LEGISLATIVE SCHEME

12 Although counsel has conceded that the Canadian Agency has no statutory power to impose liquidated damages, certain aspects of the legislative scheme must nevertheless be reviewed in order to determine whether the Court possesses jurisdiction in this matter.

13 The Farm Products Marketing Agencies Act (the Act) provides for the creation of the Council and authorizes the establishment of national marketing agencies for farm products.

14 Part II of the Act provides for the establishment of agencies, their membership, objects and powers. Subsection 16(1) of the Act permits the Governor in Council to establish by proclamation in prescribed circumstances a marketing agency with powers relating to a farm product. Such a proclamation shall, among other things set out in subsection 17(1) of the Act, designate the statutory powers under section 22 that are not vested in the agency and specify the terms of any marketing plan that the agency is empowered to implement. Subsection 17(2) of the Act provides for the alteration of a proclamation by the Governor in Council by way of a further proclamation which may, among other things, vest an agency with statutory powers withheld from it at the time of its creation, amend the terms of a marketing plan which an agency is empowered to implement or withdraw any of the statutory powers previously vested in the agency.

15 Subsection 22(1) of the Act establishes the powers of an agency and permits it, subject to the initial proclamation or any subsequent one altering its powers, to engage in various activities. For example, in paragraphs 22(1)(b), (f), (g) and (j) of the Act respectively, an agency may implement a marketing plan, make orders and regulations in connection with the implementation of a marketing plan and make an order concerning the collection and remission of licence fees, levies or charges provided for in a marketing plan. Under paragraph 22(1)(n) of the Act, an agency may do other things necessary or incidental to the exercise of any of its powers or the carrying out of any of its functions under the Act.

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16 Under Part III of the Act entitled "General", the marginal note to section 31 reads "Federal-provincial agreements". Section 31 of the Act permits the Minister of Agriculture to make an agreement, on behalf of the Government of Canada, with any province to allow the agency to perform on behalf of

the province functions pertaining to intraprovincial trade and other matters related thereto which are agreed to by the parties. The agency is then given the power in subsection 22(2) of the Act to perform on behalf of a province any function relating to intraprovincial trade that is specified in such a federal-provincial agreement.

17 In Part III of the Act, there are also provisions dealing with the recovery of debts due to an agency and offences and punishments. For example, section 36 of the Act provides that unpaid licence fees, levies or charges assessed under the terms of a marketing plan constitute a debt payable to the agency and section 37 creates summary conviction offences for, among other things, the contravention of a provision of the Act or a marketing plan.

18 Pursuant to subsection 16(1) of the Act, the Governor in Council by proclamation created the Canadian Agency. This Proclamation contains a Schedule which, among other things, sets out the terms of a marketing plan and mandates the Canadian Agency to establish by order or regulation a quota system for the provinces. Various sections of the Schedule provide the Canadian Agency with enforcement and monitoring powers. For example, in subsection 6(3) and sections 11 [as am. by SOR/91-139, s. 7] and 12 [as am. idem, s. 8] of the Schedule respectively, the Agency may reduce or refuse to allot the quota of a producer who has produced and marketed chickens in excess of his previous quota, establish a licensing system, impose, by order or regulation, levies or charges and provide for their collection. In order to determine if modifications are required to enable the Agency to carry out its objects, the Agency is required pursuant to subsection 15(1) of the Schedule to meet and review, at least once a year, the terms of the marketing plan contained in the Schedule and any orders and regulations made under the Act to implement the plan.

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19 The Federal-Provincial Agreement was made in 1978 under section 31 of the Act on the understanding, as reflected in a recital, that the parties possessed the necessary legislative power to create and operate a comprehensive chicken marketing program. This attention to legislative power is reflected throughout the Federal-Provincial Agreement. For example, under the heading "Ministers of Agriculture" in section 2 of the Agreement, the federal and provincial ministers agreed to request the Governor in Council, the lieutenants governor in council and the provincial marketing boards to exercise all legislative power necessary to create and operate the program without legal impediment. They further agreed in section 3 of the Agreement to authorize and direct the Canadian Agency and the provincial boards to delegate authority as necessary in order to implement the marketing plans annexed to the Agreement, including the Schedule A Proclamation. In section 4 of the Agreement, the Council and the provincial marketing boards, in their capacities as supervising agencies, agreed to make any marketing plan, order or regulation necessary to implement the Agreement, including the approval of regulations or orders of their respective commodity boards or the Canadian Agency. Similarly, the commodity boards agreed in subsection 5(1) to become parties to any marketing plan and to enact any regulation or order necessary in the exercise of their own jurisdiction or any delegated authority to implement the Agreement.

20 In 1984, the Federal-Provincial Agreement was amended to strengthen the monitoring and enforcement of the comprehensive chicken marketing program to accomplish certain other purposes and to provide for the imposition by the Canadian Agency of liquidated damages. In this regard, the parties agreed to repeal the quota provision in subsection 5(2) of the Federal-Provincial Agreement and replaced it with paragraph 5(2)(a) which provided that each provincial commodity board would pay liquidated damages to the Canadian Agency for any [page127] marketings in excess of its yearly

provincial allocation at the rate and in the manner prescribed by the Agency in its liquidated damages procedure resolution. Furthermore, the commodity boards agreed with the Canadian Agency in the amended paragraph 5(2)(b) that, in consideration of the Agency agreeing to the amendment, any amount assessed as liquidated damages would constitute a debt due and payable to the Agency. If the debt was not paid within the time prescribed in the Agency's liquidated damages procedure resolution or following an appeal to the Council, the outstanding amount could be recovered by the Agency in a court of competent jurisdiction. In addition, section 9 of the Agreement was revoked and replaced with an amended section providing, among other things, that the Council shall resolve finally the determination of liquidated damages. In Part II, section 3 of the amendment, the Council and the supervising agencies agreed to make any marketing plan amendment, regulation or order necessary to ensure the implementation of the amendments to the Agreement.

21 Following the amendment to the Federal-Provincial Agreement, the Canadian Agency adopted a resolution determining the rate and manner of payment of liquidated damages and subsequent production cutbacks. The substance of this resolution was changed from time to time by the Canadian Agency.

ANALYSIS

(i) Jurisdiction of the Federal Court of Canada

22 The question of the jurisdiction of this Court to entertain the application for judicial review brought by the Ontario Board involves a determination of whether the Canadian Agency, in making its assessment of liquidated damages against the Ontario Board, exercised or purported to exercise jurisdiction or powers conferred by or under an Act of Parliament within the meaning of section 2 [as am. by S.C. 1990, c. 8, s. 1] of the Federal Court Act.

[page128]

23 A review of the legislative scheme creating the Canadian Agency and the comprehensive chicken marketing program reveals that a statutorily based, carefully regulated system was implemented to control the production and marketing of chickens in Canada. To ensure the promotion of an effective chicken industry, the Canadian Agency was created by a proclamation of the Governor in Council pursuant to section 16 of the Farm Products Marketing Agencies Act (the Act). It was accorded by the Act and Proclamation various powers to enable it to perform its functions.

24 Although the Canadian Agency was not granted the power under either the Act or Proclamation to impose liquidated damages on a provincial commodity board, it nevertheless signed an amendment to the Federal-Provincial Agreement in 1984 in which the parties purported to require provincial commodity boards to pay liquidated damages. Under the terms of the amended Agreement and the liquidated damages resolution, the Canadian Agency subsequently assessed such damages against the Ontario Board. It is therefore necessary to consider whether this assessment of liquidated damages amounts to an exercise or purported exercise by the Canadian Agency of jurisdiction or powers conferred by or under a federal statute.

25 Counsel for the Canadian Agency conceded that it is subject to judicial review by this Court in the exercise of its regulatory powers. He further conceded that this Court would have jurisdiction to review the actions of the Canadian Agency under certain articles of the Federal-Provincial Agreement. However, he seeks to avoid judicial review by this Court of the actions of the Canadian Agency in imposing liquidated damages against the Ontario Board by characterizing the Federal-Provincial

Agreement, or at least that portion of it concerning liquidated damages, as a private contract.

26 The argument advanced by the Canadian Agency is initially premised on the assumption that a federal body, which has powers circumscribed by statute and proclamation, can negotiate and conclude a private bargain to expand its powers beyond those mandated [page129] to it by Parliament. I do not agree with this proposition. As stated in Administrative Law by Sir William Wade (Oxford: Clarendon Press, 1988, at page 264), it is a primary rule that "no waiver of rights and no consent or private bargain can give a public authority more power than it legitimately possesses." The Canadian Agency, which by its very nature is a creature of statute and proclamation, may only exercise those powers specifically accorded to it by the Act or Proclamation. In making an agreement to assess liquidated damages against the provincial commodity boards, the Canadian Agency has expanded its powers beyond those mandated to it by Parliament. Accordingly, its purported exercise of jurisdiction or powers in imposing liquidated damages under the terms of the Federal-Provincial Agreement is beyond those powers conferred on it by or under the Act or Proclamation and, for this reason alone, is reviewable by this Court.

27 The argument advanced by the Canadian Agency is further premised on the assumption that a federal-provincial agreement negotiated pursuant to the provisions of a statute may be characterized as a private contract. However, this proposition is not tenable at law. An agreement negotiated between federal and provincial governments pursuant to the provisions of a statute is not an ordinary, private contract, but rather an agreement between governments. Such an agreement is not enforceable as a private contract. (See Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at pages 553-554 and 565.) The Federal-Provincial Agreement in question in the case at bar was negotiated pursuant to section 31 of the Act. The parties to the Agreement acknowledged its legislative base in the recitals and the Agreement itself is replete with references to legislative authority. It cannot properly be characterized as a private contract in order to oust the jurisdiction of this Court. Furthermore, the actions of the Canadian Agency were undertaken pursuant to the statutorily authorized amended Federal-Provincial Agreement. Its actions therefore constitute the exercise or purported exercise of jurisdiction or powers by or under an Act [page130] of Parliament, as a result of which this Court has jurisdiction to entertain the application of the Ontario Board for judicial review.

(ii) Prematurity

28 The amendment to section 9 of the Federal-Provincial Agreement provides that the Council shall be the body to resolve finally the determination of liquidated damages. Counsel for the Canadian Agency argues that this provision requires the Ontario Board to appeal and obtain a ruling from the Council on the 1991 liquidated damages assessment before bringing its judicial review application in this Court. I cannot accept this argument either based on a consideration of a plain reading of the section or the jurisprudence.

29 A plain reading of section 9 of the amended Federal-Provincial Agreement reveals that the Council is to provide the final resolution of the "determination" of liquidated damages. In other words, Council must consider the appropriateness of the assessment of liquidated damages in the circumstances of the case on appeal. There is nothing in section 9 which purports to oust the jurisdiction of the Court to review the power of the Canadian Agency to impose liquidated damages. Indeed, even if section 9 of the amended Federal-Provincial Agreement purported to do so, it could not prevent the Court from conducting judicial review of a jurisdictional issue. (See Crevier v. Attorney General of Quebec et al., [1981] 2 S.C.R. 220.) Accordingly, the application of the Ontario Board for judicial review is not premature.

DECISION

30 The application of the Canadian Agency to quash the motion of the Ontario Board is dismissed with costs payable to the Ontario Board in any event of the cause.

qp/d/qladj

TAB 10

Case Name:

Snopko v. Union Gas Ltd.

Between
Marie Snopko, Wayne McMurphy, Lyle Knight and Eldon Knight,
Plaintiffs (Appellants), and
Union Gas Ltd. and Ram Petroleums Ltd., Defendants
(Respondents)

[2010] O.J. No. 1335

2010 ONCA 248

317 D.L.R. (4th) 719

261 O.A.C. 1

100 O.R. (3d) 161

187 A.C.W.S. (3d) 110

100 L.C.R. 137

Docket: C49977

Ontario Court of Appeal
Toronto, Ontario

R.J. Sharpe, J.L. MacFarland and D. Watt JJ.A.

Heard: January 22, 2010.
Judgment: April 7, 2010.

(32 paras.)

Civil litigation -- Civil procedure -- Disposition without trial -- Dismissal of action -- Lack of jurisdiction -- Judgments and orders -- Summary judgments -- Availability -- To dismiss action -- Appeal by Snopko and others from summary judgment dismissal of action dismissed -- Appellants contended their claim attacked validity of agreements relied upon by respondent and therefore fell outside ambit of section 38 of Ontario Energy Board Act or, at very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment -- Section 38 of Act conferred exclusive jurisdiction on Board to decide all issues pertaining to compensation from operation of gas storage operation run by respondent, and various claims by appellants fell within that exclusive jurisdiction.

Natural resources law -- Oil and gas -- Royalties and rents -- Appeal by Snopko and others from

summary judgment dismissal of action dismissed -- Appellants contended their claim attacked validity of agreements relied upon by respondent and therefore fell outside ambit of section 38 of Ontario Energy Board Act or, at very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment -- Section 38 of Act conferred exclusive jurisdiction on Board to decide all issues pertaining to compensation from operation of gas storage operation run by respondent, and various claims by appellants fell within that exclusive jurisdiction.

Appeal by Snopko and others from the summary judgment dismissal of their action against Union. The motion judge concluded that section 38 of the Ontario Energy Board Act conferred exclusive jurisdiction on the Board to decide all issues pertaining to compensation from the operation of the gas storage operation run by the respondent Union, and that the various claims by the appellants fell within that exclusive jurisdiction. On appeal, the appellants contended that as their claim attacked the validity of agreements relied upon by the respondent and alleged breach of contract, negligence, unjust enrichment and nuisance, it fell outside the ambit of section 38 or, at the very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

HELD: Appeal dismissed. In substance, all of the claims raised by the appellants fell within the language of section 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the [designation] order". The position advanced by the appellants that the Board's jurisdiction could have been avoided by virtue of the legal characterization of the cause of action asserted would have defeated the intention of the legislature. As the issue of jurisdiction was an issue of pure law, the motion judge was correct in dealing with it by way of summary judgment.

Statutes, Regulations and Rules Cited:

Ontario Energy Board Act, S.O. 1998, c. 15, Sched. B, s. 19(1), s. 36.1(1), s. 36.1(2), s. 37, s. 38(1), s. 38(2), s. 38(3), s. 38(4)

Appeal From:

On appeal from the judgment of Justice John A. Desotti of the Superior Court of Justice, dated January 6, 2009.

Counsel:

Donald R. Good, for the appellants.

Crawford Smith, for the respondents.

The judgment of the Court was delivered by

1 R.J. SHARPE J.A.:-- This appeal involves a question as to the jurisdiction of the Ontario Energy Board (the "Board"), namely, the extent of the Board's exclusive jurisdiction to deal with legal and factual issues raised by a party claiming damages arising from the use of natural gas storage pools.

Facts

2 The appellants are landowners in a rural area near the Township of Dawn-Euphemia. Their lands form part of the Edys Mills Storage Pool, one of 19 natural gas storage pools operated by the respondent Union Gas Ltd. ("Union") as part of its integrated natural gas storage and transmission system. Natural gas storage pools are naturally occurring geological formations suitable for the injection, storage and withdrawal of natural gas.

3 In the 1970s, the appellants (to be read in this judgment where necessary as including the appellants' predecessors in title or interest) entered into petroleum and natural gas leases with Ram Petroleums Ltd. ("Ram"). Those leases granted Ram the right to conduct drilling operations on the appellants' properties in exchange for a monthly royalty payment on all oil produced. In October 1987, the appellants entered into Gas Storage Leases (the "GSLs") with Ram, which ratified the earlier gas and petroleum leases and provided the appellants with a 10% profit share of all of Ram's earnings from storage operations unless the leases were assigned to a third party. The GSLs required the appellants' consent before such an assignment could be made.

4 In August 1989, the appellants agreed to Ram's assignment of the GSLs to Union. The appellants assert that they consented to the assignment on the understanding, based on representations made by Ram, that they would receive significant crude oil royalty payments from Union under the earlier leases. However, shortly after the assignment, Union ceased oil production and all royalty payments ceased.

5 In 1992, the appellant Snopko entered into an Amending Agreement pursuant to which Union acquired the right to construct certain roadways on her property. In the Amending Agreement, Snopko acknowledged receipt of compensation in respect of these roadways while also reserving the right to make a future claim in relation to wells installed by Union.

6 On November 30, 1992, the Lieutenant Governor in Council issued a regulation designating the Edys Mills Storage Pool as a designated gas storage area. On February 1, 1993, the Board issued a Designation Order under the predecessor legislation granting Union's application for an order authorizing it to inject, store, and remove gas from the Edys Mills Storage Pool, and giving it permission to drill and construct the wells and other facilities necessary to connect the Edys Mills Storage Pool to Union's integrated natural gas storage and transmission system.

7 Between 1993 and 1999, Union paid the appellants compensation pursuant to the terms of their GSLs and, in the case of the appellant Snopko, pursuant to the 1992 Amending Agreement. Union also provided compensation to the appellants Lyle and Eldon Knight pursuant to a Roadway Agreement they had entered into, which provided for certain annual roadway payments.

8 The Lambton County Storage Association (the "LCSA"), of which the appellants were members at the relevant time, is a volunteer association representing approximately 160 landowners who own property within Union's storage system. In 2000, the LCSA brought an application before the Board seeking "fair and equitable compensation" from Union pursuant to s. 38(3) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B (the "Act"), which requires a party authorized to use a designated gas storage area to make "just and equitable compensation" for the right to store gas or for any damage resulting from the authority to do so.

9 Union argued that, in the light of the terms of their leases, the appellants had no standing to apply for compensation. In a Decision and Order dated September 10, 2003, the Board found that Snopko's standing was limited to issues not dealt with in the GSLs and that the appellant McMurphy had no standing.

10 Before the remaining issues were decided on the merits by the Board, the LCSA and Union settled

on the question of just and equitable compensation for all claims arising between 1999-2008 that were or could have been raised at the hearing. On March 23, 2004, the Board approved this settlement by way of a Compensation Order.

11 Consistent with the terms of an undertaking given by Union to the Board, Union extended to all LCSA members who did not receive full standing an offer to be compensated on the same terms enshrined in the Compensation Order. Each of the appellants accepted. The agreements pertaining to the appellants Lyle and Eldon Knight extend to 2013.

12 On January 29, 2008, the appellants commenced this action in the Superior Court against both Ram and Union, alleging breach of contract, negligence, unjust enrichment and nuisance.

13 The appellants advance the following claims against Union:

* *breach of contract* - the appellants claim that Union, in breach of their GSLs, has failed to properly compensate them for crop loss and other lost income arising from Union's storage operations (statement of claim, at paras. 26-27);
* *unjust enrichment* - the appellants claim that Union has been unjustly enriched by storing gas on and in the appellants' land (statement of claim, at para. 28 (b));
* *nuisance* - the appellants claim that Union's storage operations, which have decreased the profitability of their land, caused damage to their land and decreased their enjoyment of the land, constitute a nuisance (statement of claim, at para. 36);
* *negligence* - the appellants claim that due to Union's storage operations, oil has not been produced from the Edys Mills Storage Pool since 1993 and, as a result, the appellants have not received royalty payments since that time (statement of claim, at para. 37(c)); and
* *termination of contract* - the appellants seek a declaration that their GSLs were terminated in 2006, along with compensation from Union on the basis that it is storing gas without a contract (statement of claim, at paras. 34-35).

14 The claim against Ram is framed in misrepresentation, negligence, breach of contract and unjust enrichment. More importantly, the appellants plead that the agreement permitting Ram to assign the GSLs should be set aside on grounds of unconscionability.

15 In September 2008, Union moved for summary judgment dismissing the action against it on several grounds, namely: (i) that the Superior Court has no jurisdiction to entertain the claim, as it falls within the exclusive jurisdiction of the Board; (ii) that the claims are statute-barred under the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B (the "LTA"); and (iii) that the claims are barred by the doctrines of *res judicata* or abuse of process.

16 Ram took no part in the motion for summary judgment and the claims advanced against it by the appellants remain outstanding.

Legislation

17 The Act provides as follows with respect to the regulation of gas storage areas:

Gas storage areas

36.1(1) The Board may by order,

(a) designate an area as a gas storage area for the purposes of this Act; or
(b) amend or revoke a designation made under clause (a). 2001, c. 9, Sched. F, s. 2 (2).

Transition

(2) Every area that was designated by regulation as a gas storage area on the day before this section came into force shall be deemed to have been designated under clause (1)(a) as a gas storage area on the day the regulation came into force. 2001, c. 9, Sched. F, s. 2(2).

Prohibition, gas storage in undesignated areas

37. No person shall inject gas for storage into a geological formation unless the geological formation is within a designated gas storage area and unless, in the case of gas storage areas designated after January 31, 1962, authorization to do so has been obtained under section 38 or its predecessor. 1998, c. 15, Sched. B, s. 37; 2001, c. 9, Sched. F, s. 2(3).

Authority to store

38.(1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38(1).

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),
(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and
(b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order. 1998, c. 15, Sched. B, s. 38(2).

Determination of amount of compensation

(3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board. 1998, c. 15, Sched. B, s. 38(3).

Appeal

(4) An appeal within the meaning of section 31 of the *Expropriations Act* lies from a determination of the Board under subsection (3) to the Divisional Court, in which case that section applies and section 33 of this Act does not apply.

18 In addition, s. 19 of the Act provides as follows:

Power to determine law and fact

> 19.(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

Disposition of the motion judge

19 The motion judge granted Union's motion for summary judgment and dismissed the claim on jurisdictional grounds. The motion judge followed the decision of Pennell J. in *Re Wellington and Imperial Oil Ltd.*, [1970] 1 O.R. 177 (H.C.J.), at pp. 183-84:

> [I]n many cases where a dispute arises as to the amount of compensation, the first thing a board of arbitration has to do is to inquire what were the subsisting rights at the time the right to compensation arose; and that in some cases such inquiry would necessarily involve the interpretation of agreements in which the subsisting rights were embodied.
>
> ...
>
> It is with reluctance that I conclude that the Legislature has taken away the *prima facie* right of a party to have a dispute determined by declaration of the Court.

20 The motion judge concluded that s. 38 conferred exclusive jurisdiction on the Board to decide all issues pertaining to compensation from the operation of the gas storage operation and that the appellants' claims fell within that exclusive jurisdiction. Accordingly, he dismissed the appellants' action.

Issue

21 While Union submits that the appellants' claims should be dismissed on several grounds, the central issue on this appeal is whether the motion judge erred in concluding that the Superior Court has no jurisdiction to entertain those claims against Union.

Analysis

22 Under the Act, the Board has broad jurisdiction to regulate the storage of natural gas, to designate an area as a gas storage area, to authorize the injection of gas into that area, and to order the person so authorized to pay just and equitable compensation to the owners of the property overlaying the storage area. Moreover, s. 38(3) provides that no civil proceeding may be commenced in order to determine that compensation.

23 The appellants concede that if their claim arose simply from an inability to agree with Union on the *amount* of compensation, s. 38(3) of the Act grants the Board exclusive jurisdiction. They submit, however, that as their claim attacks the validity of agreements relied upon by Union and alleges breach of contract, negligence, unjust enrichment and nuisance, it falls outside the ambit of s. 38 or, at the very least, there is a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

24 I am unable to accept the appellants' submission that the legal characterization of their claims determines the issue of the Board's jurisdiction. It is the substance not the legal form of the claim that should determine the issue of jurisdiction. If the substance of the claim falls within the ambit of s. 38, the Board has jurisdiction, whatever legal label the claimant chooses to describe it. As Pennell J. stated

in *Re Wellington and Imperial Oil Ltd.*, at p. 183, "whatever may be the form of the issue presented ... it is in substance a claim for compensation in respect of a gas right and damages necessarily resulting from the exercise of the authority given by virtue of the order of the Ontario Energy Board."

25 The claims advanced by the appellants in the statement of claim all arise from Union's operation of the Edys Mills Storage Pool. The claim for breach of contract asserts that Union has failed to compensate the appellants for crop loss and other lost income arising from Union's storage operations. The claim for unjust enrichment asserts that Union "is enriched by storing gas on and in the Plaintiffs' land and is enriched by having oil located in the Plaintiffs' land left in place." The nuisance claim asserts that "Union's gas storage operation unreasonably interferes with [the Plaintiffs'] enjoyment of their land." The negligence claim asserts that Union "was negligent in their gas storage operations", thereby causing harm to the appellants. Finally, the appellants alleged that Union has been storing gas without a contract.

26 In my view, in substance, these are all claims falling within the language of s. 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the [designation] order."

27 Section 19 provides that, in the exercise of its jurisdiction, the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." This generous and expansive conferral of jurisdiction ensures that the Board has the requisite power to hear and decide all questions of fact and of law arising in connection with claims or other matters that are properly before it. This includes, *inter alia*, the power to rule on the validity of relevant contracts and to deal with other substantive legal issues.

28 In response to the court's invitation to make written submissions on the jurisdictional issue, counsel for the Board advised us that the jurisprudence of the Board supports an expansive interpretation of its jurisdiction under its enabling statute, which would include the ability to determine the validity of compensation contracts. In *The Matter of certain applications to the Ontario Energy Board in respect of the Bentpath Pool* (1982), E.B.O. 64(1) & (2), the Board held, at p. 33, that it "does have the power, as part of its broader administrative function, to determine the validity of contracts" for the purpose of determining the appropriate compensation to be paid to a landowner under what is now s. 38 of the Act. I agree with the respondent that *Bentpath* and *Re Wellington and Imperial Oil Ltd.* supersede the Board's earlier decision in *The Matter of an Application by Union Gas Company of Canada and Ontario Natural Gas Storage to inject gas into, store gas in and remove gas from the designated gas storage area known as Dawn #156 Pool* (1962), E.B.O. 1.

29 By precluding other actions or proceedings with respect to claims falling within the ambit of s. 38 (2) of the Act, s. 38(3) precludes the courts from, in effect, usurping the jurisdiction of the Board by entertaining claims that it is empowered to decide. I agree with Union's submission that, to endorse the appellants' position by holding that the Board's jurisdiction could be avoided by virtue of the legal characterization of the cause of action asserted, would defeat the intention of the legislature.

30 In my view, the motion judge did not err in concluding that this was a proper case for summary judgment. The issue of jurisdiction is an issue of pure law and the motion judge was correct in dealing with it by way of summary judgment.

31 As the appeal must be resolved on the basis that the Board has exclusive jurisdiction to determine all issues of law and of fact arising from the appellants' claim against Union, it is unnecessary for me to deal with the alternative grounds for dismissal of the claim advanced by Union.

Disposition

32 For these reasons, I would dismiss the appeal with costs to the respondent fixed at $7306.73, inclusive of GST and disbursements.

R.J. SHARPE J.A.
J.L. MacFARLAND J.A.:-- I agree.
D. WATT J.A.:-- I agree.

cp/e/qllxr/qljxr/qljyw/qlhcs/qlced/qlhcs

TAB 11

Case Name:

Natural Resource Gas Ltd. v. Ontario Energy Board

Between
Natural Resource Gas Limited, Appellant, and
Ontario Energy Board, Respondent

[2006] O.J. No. 2961

214 O.A.C. 236

2006 CanLII 24440

149 A.C.W.S. (3d) 889

Docket: C44333

Ontario Court of Appeal
Toronto, Ontario

J.I. Laskin, S. Borins and R.G. Juriansz JJ.A.

Heard: April 28, 2006.
Judgment: July 21, 2006.

(37 paras.)

Administrative law -- Judicial review and statutory appeal -- Deference to expertise of decision maker -- Standard of review -- Reasonableness -- Appeal by energy distributor from decision, reported at [2005] O.J. No. 1520, dismissing distributor's appeal from Board decision refusing to permit distributor from recovering regulatory and interest costs incurred in securing permission to recover unrecorded costs dismissed -- Board was specialized expert tribunal -- Decision reviewable on reasonableness standard -- Decision was reasonable -- Although unrecorded costs prudently incurred, regulatory and interest costs not necessarily prudently incurred -- Ontario Energy Board Act, s. 36.

Administrative law -- Public utilities -- Appeal by energy distributor from Board decision refusing to permit distributor from recovering regulatory and interest costs incurred in securing permission to recover unrecorded costs dismissed -- Board was specialized expert tribunal -- Decision reviewable on reasonableness standard -- Decision was reasonable -- Although unrecorded costs prudently incurred, regulatory and interest costs not necessarily prudently incurred.

Natural resources law -- Oil and gas -- Regulation -- Appeal by energy distributor from Board decision refusing to permit distributor from recovering regulatory and interest costs incurred in securing permission to recover unrecorded costs dismissed -- Board was specialized expert tribunal -- Decision reviewable on reasonableness standard -- Decision was reasonable -- Although unrecorded costs prudently incurred, regulatory and interest costs not necessarily prudently incurred.

Appeal by Natural Resource Gas from the dismissal of its appeal from a decision of the Ontario Energy Board. Natural purchased gas from producers and distributed gas to customers at rates regulated by the Board. An accounting error resulted in Natural failing to record $531,794 in gas purchasing costs from October 2002 to December 2003. In the normal course of business, these costs would have been passed on the Natural's customers. Natural applied to the Board to record the costs as a debit as of January 1, 2004 and an order allowing Natural to recover the unrecorded costs by increasing rates for a twelve-month period commencing May 1, 2004. The Board found the unrecorded costs were material and prudently incurred, and therefore Natural should be permitted to recover them. The Board decided Natural's recovery of the costs would be deferred over three years. The Board decided Natural was not allowed to recover regulatory costs or interest charges associated with the deferral.

HELD: Appeal dismissed. The Board's decision was reasonable. The Board was a specialized expert tribunal with broad authority to regulate the energy sector. The Board was faced with a question of mixed fact and law, involving policy considerations. As such, the Board possessed greater expertise than the court in determining the answer. Its decision was reviewable on the standard of reasonableness. The decision was not inconsistent with the proposition Natural should be allowed to recover all its prudently incurred costs. Although the costs were prudently incurred, the regulatory costs and interest costs were not necessarily prudently incurred. But for the accounting error, Natural would not have incurred costs to secure and obtain the Board's decision to permit recovery of the unrecorded costs.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, s. 2, s. 33, s. 36, s. 44

Appeal From:

On appeal from the order of the Divisional Court dated April 21, 2005.

Counsel:

Alan Mark and Jennifer Teskey for the appellant

Glenn Zacher for the respondent

R.G. JURIANSZ J.A.:--

I. Introduction

1 Natural Resource Gas Limited ("NRG") appeals from a decision of the Divisional Court dated April 21, 2005, dismissing its appeal of the Review Decision of the Ontario Energy Board (the "OEB") dated April 19, 2004.

2 NRG purchases gas from producers and distributes it to its customers at rates regulated by the OEB. Because of an accounting error, NRG had unrecorded costs of purchasing gas in the amount of $531,794 during the period from October 1, 2002 to December 31, 2003. Had these costs been recognized, they would have been passed on to NRG's customers in the normal course. After an initial unsuccessful application, NRG made a second application to the OEB on January 20, 2004 in which it sought authorization to record the unrecorded costs as a debit as of January 1, 2004 and an order allowing the recovery of the unrecorded costs by increasing its rates over a twelve month period commencing May 1, 2004. The OEB's Review Decision on that application is the subject of this appeal.

3 In that decision, the OEB found the unrecorded costs were material and had been prudently incurred and therefore NRG should be permitted to recover them. The OEB also decided that NRG's recovery of the costs would be deferred over three years to minimize rate volatility to customers. Then, in what gives rise to this appeal, the OEB went on to decide that NRG would not be allowed to recover any of its regulatory costs or the interest charges associated with the deferral of the recovery of the unrecorded costs.

4 NRG contends that the interest and regulatory expenses result not from the accounting error but from the OEB's decision to defer recovery the unrecorded costs. NRG submits that since the OEB decided that the unrecorded costs were prudently incurred, it follows that the expenses that are associated with the OEB's decision to defer recovery are also prudently incurred. NRG asserts that as a matter of law it would not be "just and reasonable" to deny their recovery.

5 I would dismiss the appeal because the OEB's decision satisfies the applicable standard of review: reasonableness.

II Issues on Appeal

1. What is the standard of review that applies to the OEB's decision?
2. Did the OEB commit reversible error by denying NRG recovery of its regulatory costs and interest charges?

III Standard of Review

6 The Divisional Court applied a standard of reasonableness: "[I]n view of the lack of a privative clause, the OEB's disposition attracts at least a standard of reasonableness." NRG submits the Divisional Court erred and that the proper standard of review of the OEB's decision in this case is correctness.

7 In two recent decisions, *Graywood Investments Ltd. v. Toronto Hydro-Electric System*, [2006] O.J. No. 2030 (C.A.) and *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)*, [2006] O.J. No. 1355 (C.A.), this court has considered the standard of review of decisions of the OEB.

8 In *Enbridge*, while the result did not turn on the standard of review, Doherty J.A. did note (at para. 17) that the OEB had advanced a "forceful argument that the standard of review should, at the highest, be one of reasonableness".

9 In *Graywood*, MacPherson J.A. recognized the expertise of the OEB in general (at para. 24):

> First, the OEB is a specialized and expert tribunal dealing with a complicated and multi-faceted industry. Its decisions are, therefore, entitled to substantial deference.

10 In order to take this case outside the application of this general conclusion, NRG must establish that the nature of the question in dispute and the relative expertise of the OEB regarding that question are different in this case than in *Graywood*.

11 *Graywood* concerned a dispute as to whether the parties had agreed that Toronto Hydro would install an electricity distribution system in a Graywood building project before November 1, 2000. This case concerns whether the OEB's decision to deny recovery of certain regulatory and interest expenses is "just and reasonable". I am satisfied the nature of these questions is sufficiently different that it is necessary to address the standard of review that applies in this case afresh. That *Graywood* was not available to the parties when this case was argued provides additional reason to do so.

12 Determining the applicable standard of review requires a pragmatic and functional consideration of four factors:

> i) the existence of a privative clause;
> ii) the expertise of the tribunal;
> iii) the purpose of the statute as a whole, and the provision in particular; and
> iv) the nature of the question in dispute.
>
> *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at paras. 29-38.

13 These factors, in my view, need not be analysed separately or in any particular order. I address all four factors in the following general discussion.

14 The OEB derives its authority from the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B (the "*Act*").

15 The objectives of the OEB with respect to gas regulation are set out in section 2 of the *Act*:

> 2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
>
> 1. To facilitate competition in the sale of gas to users.
> 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
> 3. To facilitate rational expansion of transmission and distribution systems.
> 4. To facilitate rational development and safe operation of gas storage.
> 5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.
>
> 5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.
>
> 6. To promote communication within the gas industry and the education of consumers. 1998, c. 15, Sched. B, s. 2; 2002, c. 23, s. 4(2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2.

16 The OEB also has a broad rule-making regulatory jurisdiction:

> 44(1) The Board may make rules,
>
> (a) governing the conduct of a gas transmitter, gas distributor or storage company as such conduct relates to its affiliates;
> (b) governing the conduct of a gas distributor as such conduct relates to any person,
>
> (i) selling or offering to sell gas to a consumer,
> (ii) acting as agent or broker for a seller of gas to a consumer, or
> (iii) acting or offering to act as the agent or broker of a consumer in the purchase of gas;

(c) governing the conduct of persons holding a licence issued under Part IV;
(d) establishing conditions of access to transmission, distribution and storage services provided by a gas transmitter, gas distributor or storage company;
(e) establishing classes of gas transmitters, gas distributors and storage companies;
(f) requiring and providing for the making of returns, statements or reports by any class of gas transmitters, gas distributors or storage companies relating to the transmission, distribution, storage or sale of gas, in such form and containing such matters and verified in such manner as the rule may provide;
(g) requiring and providing for an affiliate of a gas transmitter, gas distributor or storage company to make returns, statements or reports relating to the transmission, distribution, storage or sale of gas by the gas transmitter, gas distributor or storage company of which it is the affiliate, in such form and containing such matters and verified in such manner as the rule may provide;
(h) establishing a uniform system of accounts applicable to any class of gas transmitters, gas distributors or storage companies;
(i) respecting any other matter prescribed by regulation. 1998, c. 15, Sched. B, s. 44(1).

17 The provision in issue is s. 36 of the *Act*. It prohibits a gas distributor from selling gas or charging for its distribution except in accordance with an order of the OEB and provides that the OEB is not bound by the terms of the contract. It authorizes the OEB to approve or fix "just and reasonable rates" for the sale, transmission, distribution and storage of gas. It allows the OEB, in approving or fixing just and reasonable rates, to adopt any method or technique that it considers appropriate. At the time it provided in part:

> 36(1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> (2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.
> (3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.
>
> ...

18 It is clear that the Act constitutes the OEB as a specialized expert tribunal with the broad authority to regulate the energy sector in Ontario. In carrying out its mandate, the OEB is required to balance a number of sometimes competing goals. On the one hand, it is required to protect consumers with respect to prices and the reliability and quality of gas service, but on the other hand, it is to facilitate a financially viable gas industry. The legislative intent is evident: the OEB is to have the primary responsibility for setting gas rates in the province.

19 The Act does not contain a privative clause. Section 33 provides a right of appeal to the Divisional Court from an order of the OEB "only upon a question of law or jurisdiction".

20 NRG would characterize the question at issue as one of law, namely, the definition of the phrase "just and reasonable" as used in section 36 of the Act. NRG submits that, properly interpreted, the words "just and reasonable" require that a utility be allowed to recover all its legitimate, prudently incurred costs. NRG argues that the OEB, having found that the unrecorded costs were prudently incurred but not initially recognized because of an accounting error, cannot disallow interest costs that result not from the

accounting error, but from the OEB's decision to defer recovery over three years.

21 The OEB suggests that the question is one involving the manner in which the OEB exercised its discretion in fixing NRG's rates.

22 The Divisional Court described the nature of the question in this way:

> The question before the Board was therefore not simply whether recovery of costs prudently incurred should be allowed, as the appellant characterized it. The matter was compounded by the added issue of how to deal with the accumulation of costs caused by the appellant's inadvertence. The Board determined that customers must pay the prudently incurred unrecorded costs of the appellant, but the impact of recovery of the accumulated total should be ameliorated by allowing recovery over three years. The accumulated cost of the time over which recovery from customers would be required and the appellant's regulatory costs ... must be borne by the appellant. That issue was not a question of law but one involving fact-finding, policy considerations, rate-setting expertise, and law.

23 I agree. While the question does involve the meaning of the phrase "just and reasonable", it requires the application of that phrase to the particular and unusual facts of this case. The question is one of mixed fact and law and involves policy considerations as well. The OEB possesses greater expertise relative to the court in determining the question.

24 Consequently, I conclude that the OEB's decision is reviewable on a standard of reasonableness.

IV Is the Decision in This Case Reasonable?

25 The Supreme Court of Canada, in *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, explained (at 270) what the reasonableness standard requires of a reviewing court:

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere.

26 NRG submits that, as a matter of law, rates that deny utilities recovery of their legitimate prudently incurred costs cannot be "just and reasonable". Rates must be "just and reasonable" to utilities as well as to consumers. Utilities cannot be expected to provide service if they are not allowed to recover their costs and a fair return.

27 NRG relies on the decision of the Federal Court of Appeal in *TransCanada Pipelines Limited v. National Energy Board*, [2004] F.C.J. No. 654 (C.A.). Under its governing legislation, the National Energy Board's authority to determine just and reasonable tolls, like that of the OEB, is not limited by any statutory directions. Rothstein J.A. indicated that the impact on customers or consumers could not be a factor in the determination of the utility's cost of equity capital. However, any resulting increase could be so significant that it would be proper for the Board to phase in the tolls over time provided there was no economic loss to the utility. He said (at para. 43), "In other words, the phased in tolls would have to compensate the utility for deferring recovery of its cost of capital."

28 I do not read the OEB's decision to be inconsistent with the proposition that a utility must be

allowed to recover all of its prudently incurred costs. The OEB, upon concluding that the unrecorded gas costs had been prudently incurred, allowed NRG to recover them. However, the OEB did not accept the premise of NRG's position on this appeal -- that if the unrecorded gas costs were prudently incurred, it must logically follow that the regulatory costs to recover them and the interest costs associated with the deferral of their recovery were also prudently incurred. Rather, the OEB found the accumulation of these costs was attributable to NRG's failures to properly record them and to discover its error promptly:

> We are surprised and disappointed with the time that it took NRG to realize that its PGCVA mechanism was incorrect, which exposed the utility and its customers to unnecessary risk and created a difficult situation for the customers and the Board. However, we accept that the misrecording was the result of error, not a purposeful action by NRG.

29 The OEB went on to observe:

> Had NRG recorded the gas cost variances properly in the PGCVA, the present conundrum would have been avoided.
>
> ... we find the NRG's error has resulted in a substantial and avoidable accumulation of potential customers' charges, through no fault of the customers.

30 These factual findings of the OEB are not open to question on appeal. In light of these findings, the OEB said, "[W]e must therefore look for a balance". The OEB struck that balance in the following terms:

> Considering the need for NRG to recover its prudently incurred unrecorded gas costs and mitigating the impact on customers, as well as not creating undue inter-generational inequity, we find that a reasonable balance is recovery of the $531,794 amount over a three year period, in equal portions, without interest.

31 The OEB went on to say that NRG could not recover its regulatory costs incurred in the proceeding.

32 On my reading, the OEB took the view that NRG's regulatory costs were not prudently incurred. That view is reasonable. But for NRG's accounting error and the delay in recognizing it, NRG would not have had to incur costs to seek and obtain the OEB's decision to permit recovery of the unrecorded costs.

33 NRG emphasizes that it did not seek recovery of any interest charges from the time the costs were not recorded to the date of the OEB's decision finding the costs to have been prudently incurred. Therefore it submits that the interest charges it claims are the direct result of the OEB's decision to rate-smooth and not of NRG's accounting error.

34 In my view, it was open to the OEB to consider the underlying as well as the direct cause of the interest charges. The OEB said, "It is also our view that customers should not be burdened by any interest charges that would not have accrued had the customers been presented with the appropriate timely billing". While the interest charges directly result from the OEB's decision to defer their recovery, the OEB would not have faced the situation that prompted that decision "had NRG recorded the gas costs variances properly" and there had been no "substantial and avoidable accumulation of potential customers' charges". Rather, the "present conundrum could have been avoided".

35 The line of analysis from the OEB's findings of fact to the conclusion it reached is reasonable. It's balancing of the various considerations and interests before it lies at the heart of its function and

expertise. Its reasons withstand a probing analysis.

V Disposition

36 I would find that the OEB's decision was reasonable and dismiss NRG's appeal.

37 The parties indicated they would make efforts to resolve the issue of costs. If they are unable to do so they make written submissions through the court's senior legal officer.

R.G. JURIANSZ J.A.
J.I. LASKIN J.A. -- I agree.
S. BORINS J.A. -- I agree.

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TAB 12

Case Name:

Graywood Investments Ltd. v. Ontario Energy Board

Between
Graywood Investments Limited, applicant, and
Ontario Energy Board and Toronto Hydro-Electric System Limited, respondents

[2005] O.J. No. 345

194 O.A.C. 241

137 A.C.W.S. (3d) 3

Court File No. 724/02

Ontario Superior Court of Justice
Divisional Court

G.D. Lane, R.W.M. Pitt and A.M. Molloy JJ.

Heard: November 15, 2004.
Judgment: February 3, 2005.

(69 paras.)

Contracts -- Formation -- Acceptance -- Administrative law -- Judicial review and statutory appeal -- When available -- Error of mixed law and fact -- Deference to expertise of decision maker -- Standard of review -- Reasonableness -- Natural justice -- Duty of fairness -- Procedural fairness -- Right to be heard -- Denial of -- Public utilities -- Commissions -- Regulation.

Application by Graywood Investments for judicial review of, or alternatively, appeal from, a decision of the Ontario Energy Board which dismissed its complaint. In 1999, Graywood commenced development of a residential subdivision and consulted Toronto Hydro who had a monopoly on the provision of new electrical supply facilities to developers. Toronto Hydro completed the design of the electrical distribution system. In September 2000, prior to the negotiation of installation, the statutory regime was changed to open the market to competition. Toronto Hydro informed Graywood that it would only provide installation services pursuant to its pricing structure and policies in place prior to the new regime. In December 2000, the parties executed a written agreement regarding installation and backdated it to November 2000. Graywood paid the full price sought by Toronto Hydro but stated that the payment was without prejudice to its rights to challenge Toronto Hydro's position before the Ontario Energy Board. Graywood launched a complaint that Toronto Hydro violated the terms of its licence and the Distribution System Code published by the Board. The Board investigated and dismissed the complaint on the basis that an implied agreement between Graywood and Toronto Hydro predated the privatization amendments and therefore the previous monopolistic regime governed the pricing structure for the project.

HELD: Application allowed. The matter decided by the Board was whether Graywood's project was subject to an agreement with Toronto Hydro prior to the legislative change to the pricing regime. This involved questions of mixed fact and law reviewable on a standard of reasonableness. The installation contract was deliberately back-dated to November 2000 to reflect the point at which Toronto Hydro was first contacted by Graywood with respect to the installation of the distribution system. Therefore, it was unreasonable of the Board to find that an agreement arose by implication earlier than November 2000. Accordingly, the matter was remitted to the Board for further consideration.

Statutes, Regulations and Rules Cited:

Ontario Energy Board Act, 1999, ss. 19(1), 19(2), 21(2), 33(1), 33(2), 44, 70.1, 75, 75(1), 75(2), 75(3), 75(4).

Counsel:

Robert J. Howe and David S. Cherepacha, for the Applicant

F.J.C. Newbould, for the Respondent Toronto Hydro-Electric System Limited

M. Philip Tunley, for the Respondent Ontario Energy Board

REASONS FOR JUDGMENT

Reasons for judgment were delivered by A.M. Molloy J., concurred in by G.D. Lane J. Separate reasons were delivered by R.W.M. Pitt J.

A.M. MOLLOY J.:--

A. INTRODUCTION

1 1. Graywood Investments Limited ("Graywood") seeks to judicially review, or alternatively, appeal from a decision of the Ontario Energy Board (the "OEB" or "the Board") dated July 25, 2001, in which the OEB dismissed Graywood's complaint that the Toronto Hydro-Electric System Limited ("Toronto Hydro") had failed to comply with certain provisions of its licence and the Ontario Energy Board Act, 1999 ("the Act"). In particular, Graywood argued before the OEB that the subdivision project it was developing was governed by new rules which came into force on September 29, 2000 and that it was entitled to hire a contractor at competitive rates to install the electrical distribution system for the subdivision. Toronto Hydro took the position that the old monopolistic regime applied and that Graywood was obliged to retain Toronto Hydro at the rates applicable under the old system. The OEB dismissed Graywood's complaint based on its finding that Graywood and Toronto Hydro had entered into an agreement before November 1, 2000 such that an exception applied and the subdivision project did not fall within the new regime.

B. BACKGROUND FACTS

2 2. Graywood is a real estate developer. In 1999, Graywood commenced development of a residential subdivision in north Scarborough. At that time, Toronto Hydro enjoyed a monopoly on the provision of new electrical supply facilities to developers in that geographic area. Accordingly, on

November 1, 1999 Graywood consulted Toronto Hydro about the underground electrical distribution system for the subdivision.

3 3. Toronto Hydro replied by letter dated November 9, 1999 that it would proceed with the "design" of the electrical distribution system upon payment of a "deposit fee" of $110.00 per lot, which fee would later be "credited against the overall electrical charges which will be detailed in the project invoice". Graywood paid the requested design fee of $63,140.00 on December 23, 1999. Both parties obviously anticipated that Toronto Hydro would eventually be doing the installation work as at that time Toronto Hydro enjoyed a monopoly position in the market.

4 4. Toronto Hydro completed the design work and sent its design drawings to Graywood's engineers on June 27, 2000. At this point, Graywood was under no contractual obligation with Toronto Hydro to proceed any further.

5 5. It is clear that by the fall of 2000 Graywood was committed to proceeding with the development of this subdivision. In September, October and November 2000 sewers, water mains and roads were being constructed. In November 2000 Graywood contacted Toronto Hydro with respect to the installation of the electrical distribution system it had designed. Toronto Hydro refused to install the electrical system without a written contract.

6 6. By November 2000 a new regime had come into force with respect to the provision of certain electrical services, which regime was designed to end the monopoly electrical providers had previously enjoyed. Graywood took the position that the new regime applied to its subdivision and that Toronto Hydro should comply with the new scheme by making an offer to connect which Graywood could then consider and possibly exercise its option to obtain alternative bids from other electrical suppliers. Toronto Hydro disagreed, taking the position that the new regime did not apply to this subdivision and refusing to provide an offer to connect under the new scheme. Toronto Hydro insisted that it would only provide installation services pursuant to its pricing structure and policies in place prior to the new regime.

7 7. Ultimately, Graywood agreed to proceed with Toronto Hydro, but under protest with respect to the pricing structure. Toronto Hydro drafted a contract entitled "Agreement for the Installation of an Underground Electrical Distribution System in a Residential Subdivision" and forwarded it to Graywood in mid December 2000. Although executed by the parties in December 2000, the agreement stipulates that it is "made this 8th day of November, 2000". Schedule B to the agreement was a preliminary invoice for a full contract amount of $1,772,867.34. Against this, Toronto Hydro applied a credit of $63,140.00 being the "deposit" paid for the design work, such that the price to be paid by Graywood was $1,709,727.34. Toronto Hydro stipulated that the full contract price would have to be paid before it proceeded with any installation work. Graywood paid the invoice in full but stated this was without prejudice to its rights to challenge Toronto Hydro's position before the OEB and/or the courts.

C. ENDING THE MONOPOLY: CHANGES TO THE LEGISLATIVE SCHEME

8 8. On July 14, 2000, the OEB published a Distribution System Code ("the Code") which sets out minimum conditions with which distributors of electricity must comply. A "distributor" is defined as a person who owns or operates a system for distributing electricity, which includes Toronto Hydro. The Code's object was to end Toronto Hydro's monopoly and open the field to competition. Different aspects of the Code came into force at different times. Chapter 3 of the Code, dealing with "Connections and Expansions" came into force on September 29, 2000 with one key exception. The Code provided in Article 1.7 that its provisions would "not apply to projects that are the subject of an agreement entered into before November 1, 2000". That exception provision is central to the determination of the proceeding now before this Court.

9 9. Article 1.7 does not specifically define what type of "agreement" would trigger the exception to the application of Chapter 3 of the Code, nor is the term "agreement" included in the general definition section of the Code. However, Chapter 3 relates to Connections and Expansions of electrical distribution systems. The general definition section of the Code refers to only one type of agreement, that being a "Connection Agreement", which is defined as follows:

> "Connection Agreement" means an agreement entered into between a distributor and a person connected to its distribution system that delineates the conditions of the connection and delivery of electricity to that connection.

10 10. Under the Conditions of Service attached to its licence, Toronto Hydro is required to enter into a contract of service with any customer before it connects a building for a new or modified supply of electricity (Conditions of Service, section 2.1.7.1). Further, in the absence of a written agreement, the Conditions of Service provide that an agreement will be implied "with any Customer who is connected to Toronto Hydro's distribution system and receives distribution services from Toronto Hydro". The terms of such an implied agreement are stipulated to be embedded in various sources, including the Conditions of Service and the Distribution System Code (section 2.1.7.2). These provisions are mirrored in the Code. Article 2 of the Code (dealing with standards of business practice and conduct) provides:

> A distributor shall ensure that it has an appropriate Connection Agreement in place with any customer prior to commencement of service. If a Connection Agreement is not entered into once service has commenced, the provision of service by the distributor shall imply acceptance of the distributor's Conditions of Service and the terms of any applicable Connection Agreement.

11 11. Article 3.2.2 of the Code provides that if an expansion of a distributor's main distribution system is needed in order to connect a customer, the distributor is required to make an offer to the customer that must include a description of the material and labour required to build the expansion required to connect the customer, an estimate of the amount that would be charged for construction of the system by the distributor and an estimate of what the distributor will charge for the connection of the new system to its main system. The distributor is also required to inform the customer of the option of obtaining alternative bids from qualified contractors. This is the provision relied upon by Graywood, but which Toronto Hydro took the position did not apply to Graywood's subdivision because of the exception in Article 1.7 for projects subject to an agreement entered into before November 1, 2000.

12 12. Article 3.2.3 provides that, "A distributor shall be responsible for the preliminary planning, design and engineering specifications of the work required for the distribution system expansion and connection." However, under the new regime, it does not necessarily follow that the distributor will obtain the contract to construct the distribution system expansion and connection. The consumer may elect to proceed with an approved private contractor for that portion of the work.

D. PROCEEDINGS BEFORE THE ONTARIO ENERGY BOARD

13 13. Graywood wrote to the Ontario Energy Board on March 9, 2001 alleging that Toronto Hydro was in breach of its licence by failing to comply with the provisions of the Code. Toronto Hydro outlined its position in a letter dated April 4, 2001, indicating that the Code did not apply to the Graywood subdivision because of the design work undertaken by Toronto Hydro prior to November 1, 2000. Graywood requested the OEB to schedule a hearing to consider whether Toronto Hydro was in breach of its obligations.

14 14. The OEB advised Graywood in May 2001 that it would be treating Graywood's letter as a

complaint and would conduct an investigation. The OEB's letter in that regard states, in part:

> While in your letter you requested a hearing to determine whether Toronto Hydro is in compliance with the Code, the Board will treat the matters raised in your letter as a complaint. Under the licensing provisions of the Ontario Energy Board Act, 1998, parties do not have a right to obtain a hearing on matters of non-compliance. Rather, where the Board believes a licensee is in non-compliance, it may issue a notice setting out its intention to issue a non-compliance order or suspend or revoke the licence. Where parties raise issues of non-compliance, the Board has adopted the practice of referring such complaints to the Director of Licensing to investigate and make recommendations regarding further action by the Board.

15 15. Graywood did not at the time object to the manner in which the OEB proposed to deal with its complaint, other than to take the position that a hearing should be held.

16 16. Section 75 of the Ontario Energy Board Act, 1988, provides:

> 75(1) If the Board is satisfied that a licensee is contravening or is likely to contravene any licence, the Board may order the licensee to comply with its licence.
>
> (2) The Board shall give written notice to the licensee that it intends to make an order under subsection (1).
> (3) Notice under subsection (2) shall set out the reasons for the proposed order and advise the licensee that, within 15 days after the day that notice was given, the licensee may request the Board to hold a hearing.
> (4) If no request for hearing is made within the time permitted by subsection (3), the Board may make an order.
>
> (Emphasis added)

17 17. The OEB conducted an investigation and obtained extensive written submissions and documentation from Graywood. The investigation included a consideration of all of the dealings between Graywood and Toronto Hydro from the inception of the subdivision project as well as Graywood's own work within the project. Toronto Hydro was given the opportunity to provide further documentation or submissions, but did not do so.

18 18. Following its investigation, the OEB concluded that Toronto Hydro was not in breach of its licence and was not required to comply with the requirements of Chapter 3 of the Code for the Graywood subdivision project. Essentially, the OEB concluded that there was an agreement between Graywood and Toronto Hydro prior to November 1, 2000 such that the exception provision in Article 1.7 applied. The OEB's reasons for this determination are set out in a letter from the Board Secretary, the operative portion of which states:

> Based on the information provided, the Board finds that an implied agreement had been reached prior to November 1, 2000.
>
> The Board finds that in past industry practice, there was often no formal offer to connect and associated written connection agreement between parties on a specific project. The evidence indicates that Graywood had agreed to Toronto Hydro undertaking preliminary design work with respect to the Project. The evidence further demonstrates that Toronto Hydro had been included in the Project for approximately

a year prior to November 1, 2000 and that Graywood was committed to the Project proceeding as municipal servicing had commenced prior to October of 2000.

Further, the Board finds that no unfairness has resulted as clearly the Graywood Project was costed based on past industry practice.

E. PROCEDURAL FAIRNESS

19 19. Graywood raises two issues of procedural fairness. First, it argues that the OEB breached its duty of fairness in failing to conduct a hearing before making its findings. Second, Graywood objects to the Board taking into account evidence of past industry practice without giving Graywood notice of its intent to do so and an opportunity to respond to it.

20 20. With respect to the first point, Graywood requested the OEB to hold a hearing and the OEB refused, based on its conclusion that there had been no breach by Toronto Hydro. I do not agree with the applicant's contention that the Board was required to hold a hearing before concluding there had been no breach.

21 21. The language used in s. 75 of the Act is instructive. Subsections (2) and (3) provide that the Board "shall" give written notice to the licensee if it intends to make a compliance order and "shall" provide reasons for the proposed order. However, mandatory language is not used in other parts of this provision. Thus, even if the Board finds there has been non-compliance, it "may" order the licensee to comply, but is not required to do so: ss. 75(2) and (4). Given the structure of these provisions, it cannot be the case that the legislature contemplated the Board would be required to hold a hearing before deciding the licensee had complied with its licence. If the Board was required to hold a hearing with respect to every complaint of non-compliance, clearly the licensee whose rights are directly affected would have to be given notice. However, ss. 75(2) and (3) contemplate notice to the licensee only if the Board intends to make an order and, at that point, the licensee is entitled to "request" a hearing. This provision would be meaningless if the Board had already been required to hold a hearing simply by virtue of the fact that a complaint had been filed.

22 22. There is no requirement that the Board hold a hearing every time a complaint is referred to it. Rather, the right to a hearing arises only where, after its initial investigation, the Board is inclined to issue a notice of non-compliance. Even then, it is the licensee rather than the complainant who is entitled to request a hearing. Apart from that, it is entirely within the discretion of the Board whether to hold a formal hearing in this type of situation. Unless that discretion is exercised improperly (which is not alleged here), this court will not interfere. The mere decision not to hold a formal hearing is not in itself a denial of procedural fairness: Baker v. Canada (Minister of Citizenship & Immigration), [1999] 2 S.C.R. 817.

23 23. Likewise, I find no procedural unfairness in the OEB taking into account industry practice. The Board is a highly specialized tribunal. It has considerable knowledge and experience as to the nature of this particular industry and how it operates. The Board noted that it is not uncommon in the industry for there to be no formal written connection agreement. The Board was fully entitled to draw on its expertise in this regard. That is one of the distinct advantages of having these types of matters decided by a specialized tribunal. I also note that both the Toronto Hydro operating licence and the legislation contemplate this very situation and provide that an agreement consistent with the distributor's conditions of licence and the legislation will be implied in the absence of a written agreement. The Board also noted that the subdivision project had been costed based on past industry practice. Again, the Board is uniquely positioned to draw such a conclusion based on its expertise. While evidence of past industry practice might be necessary before a court or in areas outside the expertise of the tribunal, no such evidence was necessary before the Board here. The matters taken into account were within the special

expertise of the Board. The Board was entitled to draw on that expertise and was not required to give any notice of such to the complainant before making a decision.

24 24. Accordingly, I find no breach of procedural fairness by the OEB in its handling of this matter.

F. STANDARD OF REVIEW

Is the OEB Decision an Order?

25 25. Section 33(1) of the Act provides that an appeal lies to the Divisional Court from an "order of the Board", the making of a rule under section 44 or the issuance of a code under section 70.1. Section 33(2) stipulates that the appeal may be made solely upon a question of law or jurisdiction. The first issue to be determined is whether the decision of the Board in this case is an "order" within the meaning of s. 33(1) and therefore subject to an automatic right of appeal.

26 26. Sections 19(1) and (2) provide:

> 19(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and fact.
>
> (2) The Board shall make any determination in a proceeding by order.

27 27. The applicant also relies upon Section 21(2) of the Act, which prohibits the Board from making an "order" unless it has conducted a hearing on notice to the appropriate parties. However, this provision is stated to be "subject to any provision to the contrary in this or any other Act".

28 28. Section 75(4) of the Act is an example of a situation in which an "order" may be made without a hearing. It provides that where the Board is of the view that a licensee has failed to comply with the conditions of its licence, has given notice to the licensee of its intention to make a compliance order and has not received a request for a hearing from the licensee within the 15 day time limit, the Board "may make an order". However, the fact that some determinations made by the Board under s. 75 are "orders" subject to the appeal right, does not mean that every decision made by the Board in the administration of that section will necessarily be an "order". The Board performs many functions under the Act. Some are judicial, or quasi-judicial, in nature; others are more administrative. In my view, a decision by the Board that it is not appropriate to initiate the process leading up to a hearing under s. 75 is more administrative than judicial. That is not to say that important interests of other parties are not affected. Often they will be. However, in my opinion, a decision not to proceed further under s. 75 is simply a decision not to make an order. It is not itself an order, and is not subject to the appeal right set out in s. 33 of the Act.

Judicial Review

29 29. The OEB supervises the terms upon which electrical power is supplied to Ontario residents. Graywood was not able to simply retain somebody other than Toronto Hydro to connect electricity to its subdivision. Graywood attempted to obtain relief from the civil courts in respect of its contract with Toronto Hydro, but its case was dismissed on the grounds that the OEB had exclusive jurisdiction to deal with the matter: Graywood Investments v. Toronto Hydro-Electric System Ltd., [2003] O.J. No. 2091 (S.C.J.), aff'd [2004] O.J. No. 193, 181 O.A.C. 265 (C.A.). Whether or not Graywood was required to proceed with Toronto Hydro on its terms under the old monopoly regime, as opposed to the new regime, is a matter of considerable financial consequence for Graywood. Therefore, although the Board's decision not to proceed against Toronto Hydro was not an "order" subject to appeal, it clearly affected the legal rights, powers and liabilities of Graywood. As such, it is a statutory power of decision and subject to judicial review by this Court.

Standard of Review

30 30. The Supreme Court of Canada ruled in Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982 that a "pragmatic and functional approach" should be taken in determining the level of deference to be accorded an administrative tribunal. The reviewing court is required to evaluate each situation taking into account four factors: (1) whether there is a privative cause; (2) the expertise of the tribunal; (3) the purpose of the legislation as a whole and the particular provision in issue; and (4) the nature of the question before the tribunal: Pushpanathan, supra, at paras 28-38.

31 31. There is no privative clause in the Act. There is a right of appeal, but limited to questions of law and jurisdiction. As noted by the Divisional Court in Consumer's Gas Co. v. Ontario (Energy Board), [2001] O.J. No. 5024 (Div.Ct.) at para 3, that is a factor which places the Board "on a continuum short of patent unreasonableness".

32 32. The OEB is a highly specialized tribunal with considerable expertise. Consumer's Gas Co. v. Ontario (Energy Board), supra, was a judicial review of an OEB decision permitting Consumers Gas to use the value of past ratepayer benefits to pay deferred taxes amounting to $50 million. The Divisional Court applied a "reasonableness" standard of review, emphasizing the importance of deference due to the Board's high level of expertise. Carnwath J. noted, at para 2:

> The standard of review is reasonableness. In applying a pragmatic and functional approach, we have considered the high level of expertise the Board brings to its mandate - the balancing of a reasonable price to the consumer with the necessity of ensuring a viable monopolistic utility that earns a reasonable return on its capital investment. The following are but some of the activities of the Board requiring expertise:
>
> * economic forecasting
> * familiarity with accounting and income tax principles
> * special features and requirements of a monopolistic utility

33 33. While the expertise brought to bear by the OEB in the case at bar is somewhat different from the situation before the Court in the Consumer's Gas case, it is no less complex or specialized. The Board was required to balance the interests of the consumer with those of electricity distributors, suppliers and contractors, all within the context of a market that was moving from a monopolistic structure to one with some aspects of competition, but still with supervision and controls. The OEB's expertise includes not just the provision of electricity but many other aspects of construction, engineering and subdivision planning and control. The specialized nature of the OEB's expertise demands a relatively high degree of deference to its decisions.

34 34. The nature of the legislation involved also supports a deferential standard of review. The subject matter is specialized and complex, involving the balancing of many different levels of public and private interests. Further, the particular provision before the Board in this case dealt with the phasing in of a new competitive regime and was squarely within the public interest mandate and expertise of the Board.

35 35. The matter decided by the OEB was whether the Graywood subdivision project fell within the new competitive regime. This required the Board to decide whether the project was "subject to an agreement" with Toronto Hydro prior to November 1, 2000. This involves questions of law as to contract formation and statutory interpretation. However, it is not a pure question of law. To answer the

question before it, the Board was also required to consider the dealings between the parties and make findings of fact. Accordingly, the question decided by the Board was one of mixed fact and law. As such, it is less likely to be held to the standard of correctness often applied to pure questions of law. On the other hand, although there are factual aspects to the question, they did not involve determinations of disputed questions of fact or findings of credibility.

36 36. Taking all of these factors into account, I am of the view that the appropriate standard to be applied is one of reasonableness. The OEB is not required to be "correct" in its decision. It is not the court's role, therefore, to substitute its own determination for that of the Board. Rather, the court must only interfere with the OEB's decision if it is an unreasonable construction of the law when considered in light of the established facts.

G. ANALYSIS

37 37. The OEB found there was no unfairness to Graywood in requiring it to proceed under the old monopolistic regime, such that it was obliged to have Toronto Hydro construct and install its electrical system at prices fixed by Toronto Hydro. This finding was based on the Board's review of the construction plans and industry practice and its conclusion that Graywood had costed the subdivision based on the projected electrical prices under the old regime. This was a reasonable conclusion on the Board's part and I would not interfere with it.

38 38. However, the OEB's decision cannot be based solely on its view of what is fair in the circumstances. There was a system in place with established rules for the transition. The OEB was required to apply those rules. If Graywood's project was not subject to "an agreement" with Toronto Hydro prior to November 1, 2000, then Graywood was entitled to the benefit of the new regime even if that resulted in an unforeseen economic benefit to Graywood.

39 39. The central and dispositive finding made by the OEB was that an "implied agreement had been entered into prior to November 1, 2000". The Board does not set out the terms of that implied agreement, nor the operative date of the agreement. However, in the very next sentence following the finding of an implied agreement, the Board notes that in past industry practice there is often "no formal offer to connect and associated written connection agreement". The logical inference is that the Board was of the view that even though there was no written connection agreement prior to November 1, 2000, it is often the case that projects would not have such a written agreement and the Board therefore found there was an "implied" connection agreement prior to that date.

40 40. The basis for the OEB coming to that conclusion was the fact that Toronto Hydro had been involved with the project from 1999, having undertaken the preliminary design work for the electrical distribution system. Further, Graywood had committed to proceeding with the project prior to October 2000 as evidenced by the installation of municipal services. Once again, there is no issue with respect to these findings. The fact that Toronto Hydro did the design work in 1999/2000 is uncontroverted. Likewise, the OEB's conclusion on the evidence before it that Graywood had committed to going ahead with the project prior to October 2000 was a reasonable one.

41 41. If that had been the entire evidence and Toronto Hydro had proceeded with the construction and installation of the electrical distribution system in the absence of a written connection agreement, I would take no issue with the OEB's conclusion of an "implied" connection agreement, nor with the reasonableness of the Board's conclusion as to the timing of that implied agreement. However, that was not the entire evidence. The OEB was aware of, but did not refer to, the fact that Graywood and Toronto Hydro had an actual written connection agreement with respect to this project. The evidence is clear that Toronto Hydro was not contacted with respect to doing the installation until after November 1, 2000. Toronto Hydro then insisted on a formal written connection agreement before proceeding. The contract

was drafted by Toronto Hydro and Toronto Hydro dated the contract November 8, 2000, even though it was actually drafted and signed a month or so later. The question therefore is whether the OEB's finding of an implied connection agreement prior to November 1, 2000 is reasonable in light of the existence of an actual written connection agreement dated November 8, 2000. In my view, it is not.

42 42. There are many situations in which it may be appropriate to find an implied agreement in the absence of a formal written contract. The Conditions of Service attached to Toronto Hydro's license and the Distribution Code provide for such an agreement being implied. However, both contemplate that the agreement will be implied only once services have been connected and if there is no written agreement in place (see paragraph 10 above). This is consistent with basic contract law. A contract comes into existence only when its essential terms have been agreed upon by the parties. While such an agreement may be implied from the conduct of the parties, there must nevertheless be some indication of a meeting of the minds and an intention to be legally bound. The principle is succinctly stated by the British Columbia Court of Appeal in Arding v. Buckton (1956) 20 W.W.R. 487, 6 D.L.R. (2d) 586 (B.C.C.A) as follows (at para 12):

> From the authorities it would follow that a contract may be implied only when the conduct of the parties indicates that they are proceeding on the basis of some legal relation so that the function of the court is merely to find as a fact that relation with its attendant obligations and rights which the parties have so indicated by implication but have failed to express: Falcke v. Scottish Imperial Insur. Co., supra, [(1886) 34 Ch D 234]; McKissick, Alcorn, Magnus & Co. v. Hall, [1928] 3 W.W.R. 509; Leigh v. Dickeson (1884) 15 Q.B.D. 60, 54 LJQB 18.
> (emphasis added)

43 43. The parties here chose to date their contract November 8, 2000. This was not inadvertent. Toronto Hydro drafted the contract in December 2000. It was deliberately back-dated to November 8, 2000 to reflect the point at which Toronto Hydro was first contacted by Graywood with respect to the installation of the distribution system. In the face of that evidence, it is simply not reasonable to find that the agreement arose by implication earlier than November 1, 2000.

44 44. Chapter 3 of the Code came into force on September 29, 2000. At that time, there was no existing contract between Toronto Hydro and Graywood. Toronto Hydro had completed its contract for the design of the distribution system in June 2000. Graywood had paid for the design work in advance in December 1999. In 1999 when Toronto Hydro was retained to do the design work, it may well have been the expectation of the parties that Toronto Hydro would also be doing the installation. At the time, Toronto Hydro had a monopoly and, absent a change in the legislation, Graywood would have had no choice but to retain Toronto Hydro for the installation. However, an intention to enter into a contract, or even the shared expectation that a contract would eventually be formed, does not mean there is an agreement until those intentions coalesce into a meeting of the minds and the formation of a contract. Absent such a meeting of the minds, the contract does not arise, whether by implication or otherwise. As of September 29, 2000, the new regime was in force and it applied to all ongoing projects unless they were "subject to an agreement entered into prior to November 1, 2000". The exception provision is not framed to exclude all projects in which preliminary design work has already been done or where the parties have had discussions about entering into a contract. The exemption is clearly stated to apply to situation in which an agreement as been "entered into". The Board's finding that Graywood and Toronto Hydro had by implication entered into agreement prior to November 1, 2000 is unsustainable on the evidence and is an unreasonable construction of the scope of the exemption provision.

45 45. I have considered whether the OEB's finding of an implied agreement is a reference to the agreement for the design of the distribution system, rather than the connection agreement. I do not

believe the Board's decision can reasonably be construed as referring to an implied design agreement. The design agreement had been entered into the year before, had been fully performed by Toronto Hydro and had been paid for by Graywood. If the OEB meant that the existence of the design agreement prior to November 1, 2000 triggered the exemption provision, it surely would have simply said so. There would be no need to "imply" such an agreement prior to November 1, 2000. The design agreement clearly existed prior to that time. Indeed, it had been fully performed by then. In my view, it is clear from the Board's reasons that the agreement it implied was a connection agreement. It may well be the case that the exemption provision is capable of a broader construction than that, such that other types of agreements might also result in exempting a particular project from the new regime. However, it is not surprising that in the context of this case the Board interpreted Article 1.7 as referring to a connection agreement. It is the contract for the connection of services which Graywood sought to have to have governed by the new regime. Chapter 3 of the Code deals with connection agreements. The agreement at issue between Graywood and Toronto Hydro is a connection agreement. The central issue is whether that connection agreement is governed by the new regime. It makes perfect sense, therefore, that it is the timing of that connection agreement that governs which regime will apply.

H. CONCLUSION AND ORDER

46 46. As I have already noted, the OEB is a tribunal with specialized expertise. The interpretation and application of the transition provisions in the Distribution Code falls squarely within that expertise and is entitled to deference. I have no difficulty accepting all of the factual and policy considerations noted by the Board. However, the question of when this particular contract was entered into is not really dependant upon findings of fact, or policy, or statute interpretation. The question is whether an agreement can be implied prior to the date upon which the parties actually entered into it, based on the fact that the parties had a prior contract in relation to the same project. That is more a straightforward question of law and less within the special expertise of the Board. All that existed prior to November 1, 2000 was an already fully performed design agreement and the expectation prior to September 29, 2000, based on the then existing monopolistic regime, that Toronto Hydro would eventually be retained to install the system as well. In my view, the Board's finding of an implied agreement prior to November 1, 2000 was an error of law and unreasonable. It cannot stand.

47 47. The Board's decision is quashed.

48 48. The applicant also sought a declaration that its subdivision project is governed by the new Code, the issuance of a notice of intention to suspend or revoke Toronto Hydro's licence and ancillary relief by way of an accounting. These are matters within the sole jurisdiction of the OEB. It is not appropriate for this Court to usurp the function of the tribunal by making such orders.

49 49. This matter is remitted to the OEB for its further consideration, based on this Court's finding that the connection agreement between Toronto Hydro and Graywood was entered into on November 8, 2000.

50 50. If the parties cannot agree upon costs, written submissions may be forwarded to the court within 30 days.

A.M. MOLLOY J.
G.D. LANE J. -- I agree.

51 1. R.W.M. PITT J.:-- This is an application for judicial review of a decision of the respondent, Ontario Energy Board (OEB) holding that the subject subdivision was "a project that was the subject of an agreement" entered into by Graywood Investments Limited (Graywood) and Toronto Hydro-Electric System Limited (Toronto Hydro) before November 1, 2000.

52 2. I have read the reasons for judgment of my colleagues. I have no disagreement with their analysis of procedural fairness, judicial review or standard of review. However, I disagree with their conclusion that the decision of the respondent was either incorrect or unreasonable for the reasons that follow.

53 3. The undisputed evidence before the OEB was that Toronto Hydro (up to November 1, 2000) the sole supplier of electricity, and Graywood in its capacity as the developer of real property known as Warden Avenue Hydro Corridor Residential Subdivision, had discussions about the supply of electricity for the project, commencing in November 1999.

54 4. On July 14, 2000, the OEB approved and published the Distribution System Code (the "Code"), the object of which was to end Toronto Hydro's electrical monopoly.

55 5. On September 29, 2000, s. 1.7 of the Code was amended as follows:

> This Code comes into force on the day subsection 26(1) of the Electricity Act comes into force with the following exception.
>
> All of Chapter 3, Connections and Expansions and Subsection 6.2.3. of Section 6.2, Responsibilities to Generators come into force on September 29, 2000. These provisions do not apply to projects that are the subject of an agreement entered into before November 1, 2000.

56 6. By June 27, 2000, Toronto Hydro had already completed and forwarded to Graywood a design for the underground electrical system for the project, which was duly paid for by Graywood.

57 7. It is not disputed that as of November 1, 2000, there was no legally enforceable agreement between the parties for the installation of the underground electrical distribution system for the project.

THE PROCESS

58 8. The dispute is rendered more complicated than it needs be because when Toronto Hydro advised Graywood in July 2000 that the Warden Avenue project was considered to be subject to an agreement prior to November 1, 2000 and, therefore, was required to have its installation done by Hydro, Graywood filed a complaint to the OEB alleging that Toronto Hydro was in breach of its licence by virtue of the position it had taken with respect to its installation rights.

59 9. The OEB refused to accede to the request of Graywood, taking the view that the Warden project was, in fact, "subject to an agreement". The OEB's decision was issued in the form of a letter to Graywood's counsel. The relevant portions of which are as follows:

> Based on the information provided, the Board finds that an implied agreement had been entered into prior to November 1, 2000.
>
> The Board finds that in past industry practice, there is often no formal offer to connect and associated written connection agreement between parties on a specific. The evidence demonstrates that Graywood had agreed to Toronto Hydro undertaking preliminary design work with respect to the Project. The evidence further demonstrates that Toronto Hydro had been included in the Project for approximately a year prior to November 1, 2000 and that Graywood was committed to the Project as municipal servicing had commenced prior to October of 2000.

> Further, the Board finds that no unfairness has resulted as clearly the Graywood Project was costed on past industry practice.
>
> The Board finds that Toronto Hydro is not required to comply with the requirements of Chapter 3 of the Code for this Project. Therefore the Board finds that Toronto Hydro is not in breach of its licence and the Board will not issue a notice of its intention to issue a compliance order under subsection 75(2) of the Act.

I have produced these portions of the letter because the applicant has treated it as evidence of the unreasonableness of the OEB's position.

60 10. I respectfully disagree with the applicant for the following reasons:

STANDARD OF REVIEW

61 11. An application of the pragmatic and functional approach mandated by Pushpanathan v. Canada (Minister of Citizenship and Immigration) [1998] 1 S.C.R. 982, reveals:

> Privative Clause: The Act does not contain a privative clause. There is a statutory right of appeal only upon a question of law or jurisdiction.
>
> Expertise: As per this court in Consumers' Gas Co. v. Ontario Energy Board, [2001] O.J. No. 5024, the OEB has a "high level of expertise". The OEBA provides the OEB with exclusive jurisdiction to hear and determine all questions of law and fact, and its decisions on fact are not open to review.
>
> Purpose of the OEBA: The purpose of the OEBA is to maintain just and reasonable rates with respect to electricity.
>
> Nature of the Problem: The nature of the problem in this case is whether the Project was subject to an agreement entered into before November 1, 2000, within the meaning of s. 1.7 of the Code.

In my view, the standard of review ought to be reasonableness.

ANALYSIS

62 12. I agree with the respondent's view that the question whether the project was subject to an agreement entered into before November 1, 2000 within the meaning of s. 1.7 of the Code is more appropriately viewed as a question of mixed fact and law, and that the OEB's decision on that issue must be afforded a high degree of deference. The "law" component of that issue is the interpretation of the provisions of the Code, as they relate to the proper management of a major transition from monopoly to competition under the OEB Act, rather than general contractual principles. The determination is "fact-intensive", and involves an assessment of specialized facts and relationships, which are at the core of the OEB's exclusive jurisdiction. See Law Society of New Brunswick v. Ryan, [2003] 1 S.C.R. 247, at para. 41; Dr. Q. v. College of Physicians and Surgeons of B.C., [2003] 1 S.C.R. 226 at p. 240.

Frankly, if the question were as the appellant has formulated it, there would really be no issue. Contractual rights are protected unless the legislative language purporting to infringe them is explicit and unambiguous.

63 13. There was evidence to support the OEB's view that the project was subject to an agreement, not the least of which was the existence of an agreement for the design work. Nothing in the Code suggests that an agreement must mean an "agreement for installation".

64 14. It is useful, in my view, to recognize that s. 1.7 of the Code was amended to establish a "cut-off date" for ending the monopoly and introducing competition. The use of the expression "projects that were subject to an agreement" gave the OEB the flexibility to divide projects into different categories based on the stage of development in terms of the relationship with Toronto Hydro.

65 15. The object of the exercise in which the OEB was engaged was not to make legal determinations on whether a certain "implied agreement" (to use the imprecise term used by the OEB) had become a full blown enforceable agreement. It was rather to determine whether the Warden Avenue project was one of those projects that was already subject to an agreement i.e. whether it was to be governed by the old regime or the new regime. Toronto Hydro had been involved with the project for at least nine months prior to the announcement; the project would have been budgeted on the basis that Toronto Hydro, the only supplier of electricity, would have been the installer and supplier. There was an executed agreement with respect to design, and much discussion about the installation had already taken place. It would have been the expectation of the parties and in their contemplation, at least up to the date of the announcement of the new regime in July 2000, that the installation would have been done by Toronto Hydro.

66 16. In making a determination on the reasonableness of such a decision, it seems to me imperative to consider the practical implications of the decision urged upon the court by the appellants. No developer, who had not signed a contract by November 1, 2000 would consider itself bound by the requirements of the old regime once the announcement of the new regime was made. Accordingly, whatever ruse or subterfuge that would postpone the final execution to a date beyond November 1, 2000 would likely be attempted if a postponement were perceived to produce an advantage to the developer. Effectively, the whole concept of a transitional period (from July to November) would be rendered academic. The new regime would have effectively begun on the date of the announcement. As I adumbrated earlier, developers with enforceable agreements would not, in any event, have been affected by changes in the policies of the OEB. It would have been unnecessary to refer to them in the new Code. Clearly the stipulation of a transition period was designed to deal in a fair manner with developers in the grey area.

67 17. The construction of written instruments:

> 12-046 Law and Fact. The construction of written instruments is a question of mixed law and fact. The expression "construction" as applied to a document includes two things, first, the meaning of the words; and, secondly, their legal effect, or the effect which is to be given to them. Construction becomes a question of law a soon as the true meaning of the words in which an instrument as been expressed and the surrounding circumstances, if any, have been ascertained as facts. However, the meaning of an ordinary English word, of technical or commercial terms and of latent ambiguities, and the discovery of the surrounding circumstances (when they are relevant) are questions of fact.
>
> Casurina Limited Partnership v. Rio Algom Ltd., [2004] O.J. No. 177 at para. 34, citing Perry v. Telus Corp. (2002) 164 B.C.A.C. 152 at para. 14 referring to H.G. Beal, ed. Chitty on Contracts 28 ed. (London: Sweet & Maxwell, 1998) at paras. 12-043 and 12-046.

68 18. It was at a minimum, eminently reasonable for the OAB to interpret "projects subject to an agreement" in the manner that it did.

DISPOSITION

69 19. I would dismiss the application.

R.W.M. PITT J.

cp/e/qlgxc

TAB 13

Case Name:

Consumers' Gas Co. v. Ontario (Energy Board)

Between
The Consumers' Gas Company Limited, applicant, and
Ontario Energy Board, respondent, and
Industrial Gas Users Association, intervenor

[2001] O.J. No. 5024

110 A.C.W.S. (3d) 554

Court File No. 707/99

Ontario Superior Court of Justice
Divisional Court

Carnwath, Whalen and Day JJ.

Heard: December 11 and 12, 2001.
Judgment: December 19, 2001.

(8 paras.)

Administrative law -- Boards and tribunals -- Jurisdiction of particular boards and tribunals -- Energy and utility boards -- Judicial review -- Standard of review -- Curial deference to decisions of tribunals.

Application by Consumers' Gas for judicial review of a decision of the Energy Board permitting Consumers' Gas to recover $50 million as deferred taxes were paid or became payable by ratepayers. Consumers' Gas raised the doctrines of estoppel and legitimate expectation.

HELD: Application dismissed. The applicable standard of review was reasonableness. The lack of a privative clause and the right to appeal questions of law and jurisdiction placed the Board in a place on the continuum short of patent unreasonableness. However, its special expertise demanded a high degree of deference. The reasons of the Board were more than adequate to support its findings. The Board did not represent that deferred taxes of the rental programs would be paid by ratepayers. It justly and reasonably balanced the impact of the deferred taxes between ratepayers on one hand and the shareholders on the other. The Board's reasons were not merely comments and observations, as alleged by Consumers' Gas.

Counsel:

Fred D. Cass and K. John Harild, for the applicant.
Pat Moran, for the respondent.
Peter C.P. Thompson, Q.C., for the intervenor.

The judgment of the Court was delivered by

1 **CARNWATH J.** (endorsement):-- We all agree the application must be dismissed.

2 The standard of review is reasonableness. In applying a pragmatic and functional approach, we have considered the high level of expertise the Board brings to its mandate - the balancing of a reasonable price to the consumer with the necessity of ensuring a viable monopolistic utility that earns a reasonable return on its capital investment. The following are but some of the activities of the Board requiring expertise:

* economic forecasting
* familiarity with accounting and income tax principles
* special features and requirements of a monopolistic utility.

3 The lack of a privative clause and the right to an appeal on questions of law and jurisdiction place the Board on a continuum short of patent unreasonableness. Nevertheless, its special expertise demands a high degree of deference when its expertise is engaged.

4 Many of the applicant's submissions were based on doctrines of estoppel and legitimate expectation. For these submissions to succeed, we would have to find the Board "promised" or "undertook" or "represented" directly or by course of conduct that deferred taxes of the rental program would be paid by ratepayers. We do not so find. The applicant has attempted to isolate one decision of the Board to support its contention of an implied promise. To do so would ignore the changing nature of the problems the Board faced through the decades since 1961. The statement in EBRO 341-1 relied upon to support this contention we find to have general application to deferred capital expenses and, as the Board found, is not determinative.

5 Our review of Board decisions involving the applicant from 1961 forward leads us to conclude that the treatment of ancillary programs (including the rental program) evolved as the programs evolved. In 1961, ancillary programs were not treated separately. However, as the programs expanded, the Board examined them separately to ensure that ratepayers did not subsidize any activity not part of the core business of sales, transmission and distribution. In early decisions, the Board did not distinguish between ancillary program assets and the balance of the applicant's assets. The Board considered deferred taxes in the context of all the company's assets. Since the great percentage of those assets were core assets, it made sense for the applicant to recover deferred taxes from the ratepayers, since they benefited from lower rates flowing from the deferral. Once the programs expanded, it equally made sense that the applicant should look to the customers of ancillary programs, not the ratepayers, to recover deferred taxes. Thereafter, the Board consistently required ancillary program costs to be recovered from program customers. The Board did recognize that where ratepayers benefited from lower rates resulting from ancillary programs, the ratepayers should pay a proportional share of ancillary program costs. Therefore, in the decision under review, the Board permitted the applicant to recover $50 million as deferred taxes were paid, or became payable. The Board was required to balance the impact of the deferred taxes between ratepayers on the one hand and the shareholders on the other. We find the balancing carried out by the Board to be just and reasonable.

6 We reject the submission that the Board's reasons were "comments and observations". An analysis of the Board's decision reveals the following:

* the Board identified the matters it had to consider as complex and interwoven,

with significant policy and financial consequences;

* the Board recognized it had to balance the interests of ratepayers, shareholders, and users of the programs in question. In doing so, it had to consider changing legislative, regulatory and market considerations while also taking into account previous Board decisions.
* the Board explained it was not prepared to allow the rental program to be operated as part of the core utility, as requested by the applicant, since it would be impossible to track costs of the program on a fully allocated basis as previously required by the Board;
* the Board decided the rental program should remain within the applicant on a non-utility basis with costs to be determined on a fully allocated basis, as in previous Board decisions;
* the Board rejected the applicant's submission that competition was "rapidly eroding the program's remarkably high penetration". The Board then examined both forecast and actual returns over the previous ten years and decided there was a total sufficiency from the program of $50 million. The Board concluded that ratepayers had benefited to some extent from the rental program over the years and the shareholder had absorbed some of the costs of the program. It decided that while the ratepayers should not be responsible for the entire deferred tax liability, the applicant was entitled to have the benefit enjoyed by the ratepayers recognized. This led to the provision of a notional utility account in the amount of $50 million, after tax, to allow the shareholder to use the value of past ratepayer benefits to pay a portion of the deferred taxes as they became due.

7 The reasons are more than adequate to support the Board's findings.

8 If costs cannot be agreed upon, the parties have 30 days to make written submissions.

CARNWATH J.

cp/d/qlala

TAB 14

Case Name:

Enbridge Gas Distribution Inc. v. Ontario (Energy Board)

Between
Enbridge Gas Distribution Inc., appellant, and
Ontario Energy Board, respondent

[2005] O.J. No. 756

75 O.R. (3d) 72

195 O.A.C. 234

26 Admin. L.R. (4th) 233

137 A.C.W.S. (3d) 843

2005 CarswellOnt 763

Court File No. 40/03

Ontario Superior Court of Justice
Divisional Court

G.D. Lane, A.M. Molloy and D.J. Power JJ.

Heard: February 15, 2005.
Judgment: March 2, 2005.

(41 paras.)

Administrative law -- Judicial review and statutory review -- When available -- Error of law -- Standard of review -- Correctness -- Remedies -- Natural resources law -- Oil and gas -- Regulation.

Appeal by Enbridge Gas Distribution from a decision of the Ontario Energy Board. Enbridge was a gas distributor and sold gas to consumers. It was, therefore, subject to regulation by the Board. Enbridge could only pass on costs to consumers that were prudently incurred. Between 1996 and 1999 Enbridge entered into four agreements to deliver some of its gas through alternate pipeline routes. These routes were more costly than the previous route that Enbridge used. Enbridge applied for a rate increase. The Board decided that Enbridge did not act prudently when it incurred costs for two of the contracts. Enbridge claimed that the Board took into account an impermissible factor and erred in law.

HELD: Appeal allowed. The standard of review was correctness. This appeal involved a question of law and did not engage the expertise of the Board against the court. The Board articulated the correct test for its review of whether Enbridge acted prudently. However, the Board did not rule correctly. It erred

because, even though it instructed itself not to use hindsight in the evaluation of prudence, it then allowed hindsight to creep into its analysis. This was a fundamental error of law. There was evidence for the Board to conclude that the two contracts were not prudent. However, it was not possible to determine the extent to which an impermissible line of thinking clouded the Board's determination in this case. Enbridge was entitled to a decision that was based on the correct application of the legal test to the relevant facts. The decision could not stand and had to be quashed. The matter was remitted back to a different panel of the Board for reconsideration.

Counsel:

J.L. McDougall Q.C., Jerry H. Farrell, and Michael Schafler, for the Appellant

Kenneth T. Rosenberg and Richard P. Stephenson, for the Respondent

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[Editor's note: A corrected version was released by the Court September 16, 2005. The changes were not indicated. This document contains the amended text.]

REASONS FOR DECISION

The judgment of the Court was delivered by

A.M. MOLLOY J.:--

A. INTRODUCTION

1 Enbridge Gas Distribution ("Enbridge") appeals from a decision of the Ontario Energy Board ("the OEB" or "the Board") dated December 18, 2002.

2 Enbridge is a gas distributor and a seller of gas to consumers, and as such is subject to regulation by the OEB under the Ontario Energy Board Act, 1998, S.O. 1998, c. 15 ("the Act"). The rates Enbridge is permitted to charge to its customers are fixed by the OEB, based on what the OEB deems to be just and reasonable. The OEB must balance fairness to the consumer (in terms of a reasonable price for gas) and fairness to Enbridge and its shareholders (in terms of a reasonable rate of compensation and profit). Generally speaking, Enbridge would be permitted by the OEB to pass on its costs to the consumer, but only to the extent those costs were prudently incurred.

3 Prior to 1996, Enbridge shipped its gas through the TransCanada Pipeline System ("the Trans Canada"). Between 1996 and 1999, Enbridge entered into a series of four agreements with various entities to deliver some of its gas through alternate pipeline routes. These new routes became operational in 2000 and proved to be more costly than the TransCanada route. In mid-2000, Enbridge applied to the OEB for an increase in the rates it could charge to its customers in 2001 in order to reflect this increase in its supply costs. (The OEB referred to the four agreements as Alliance 1, Alliance 2, Vector 1 and Vector 2, and for ease of reference I will do the same.)

4 The parties entered into a provisional settlement in 2000, which was conditional upon various contentious issues being deferred to be argued at a subsequent Enbridge rates hearing. As a term of the settlement, Enbridge agreed to set up a "Notional Deferral Account" to record, over a ten-month period, the differential between its actual costs for the Alliance/Vector lines and its hypothetical costs if it had used the TransCanada line.

5 The next year, Enbridge applied for approval of its rates proposed for 2002. One of the contentious issues still remaining to be resolved was whether the costs incurred by Enbridge with respect to the Alliance and Vector lines were "prudently incurred". That issue proceeded to a full hearing before the Board in June 2002.

6 The Board issued its decision on December 18, 2002. The Board found that Enbridge did not act prudently in incurring the Alliance 1 and Alliance 2 costs and was therefore not permitted to build those costs into the rates it charged. The Board found, however, that the Vector 1 costs were prudently incurred and could be passed on. The Board deferred its consideration of the Vector 2 costs. In the result, Enbridge was not permitted to recover $11 million in costs incurred in respect of Alliance 1 and 2.

7 The Act provides for an appeal to this court from the decision of the Board, but "only upon a question of law or jurisdiction": s. 33(1) and (2). Enbridge argues on this appeal that the Board erred in law by failing to apply the correct legal test in determining whether Enbridge acted prudently at the time it entered into the two Alliance agreements. Specifically, Enbridge submits that although the Board articulated the correct legal test, it fell into error when it was influenced by the benefit of hindsight rather than confining itself to a consideration of prudence based solely on circumstances that existed at the time the decisions in question were made.

B. THE PRUDENCE STANDARD

8 Essentially, a utility is entitled to recover its prudently incurred costs. The test of prudence was first developed in United States jurisprudence, but has since been widely accepted in Canada: State of Missouri ex. rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri, 262 U.S. 276 (1923) at 289; British Columbia Electric Railway Co. Ltd. v. British Columbia (Utilities Commission), [1960] S.C.R. 837 at 854; Transcanada Pipelines Ltd. v. Canada (National Energy Board), [2004] F.C.J. No. 654 (C.A.) at para. 32; West Ohio Gas Co. v. Public Utilities Commission of Ohio (No.1), 294 U.S. 63 (1935) at 68.

9 Before us, and likewise before the Board, there was no dispute between the parties as to the applicability of the prudence standard and the nature of the test. Expenditures are deemed to be prudent, in the absence of some evidence suggesting the contrary. However, costs that are found to be dishonestly incurred, or which are negligent or wasteful losses, are excluded from the legitimate operating costs of the utility in determining rates that may be charged. The examination of whether an expenditure was prudent must be based on the particular circumstances at the time the decision to incur those costs was made. That is so even if in hindsight it is obvious the decision was a bad one. As was stated by the United States Court of Appeals (First Circuit) in Violet v. FERC, 800 F. 2d 280 at 282 (1st Cir. 1986):

> In an industry that combines long lead times for plant construction with wide fluctuations in supply and demand, constant changes in the regulatory environment, and unpredictability in the availability and price of alternative sources of fuel, some projects that seem prudent at the time when costs are incurred may appear, some years later, in hindsight, to have been unnecessary or inadvisable. The prudence of the investment must be judged by what a utility's management knew, or could have known, at the time the costs were incurred. (citations omitted)

10 The parties also agree that the Board in this case correctly defined the prudence standard at paragraph 3.12.2 of its decision as follows:

> * Decisions made by the utility's management should generally be presumed to

be prudent unless challenged on reasonable grounds.

* To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
* Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
* Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time.

C. THE DECISION OF THE BOARD

11 The Reasons of the Board are extensive, covering 216 pages. For purposes of this appeal, it is unnecessary to review those Reasons in detail, as there is no real issue with respect to the facts. The portion of the Reasons dealing with the Alliance/Vector issues runs from pages 27-72. However, the actual findings of the Board commence at page 62. First, the prudence test is defined (see preceding paragraph). Next, the Board examined the presumption of prudence and whether it was rebutted. The Board noted the argument made by Enbridge that it was unnecessary to consider this aspect of the test as Enbridge conceded a prudence review was appropriate. However, the Board determined that it would nevertheless be useful to actually rule on the point.

12 There was evidence before the Board that Enbridge's corporate parent, Enbridge Inc., held an equity interest in both the Alliance and Vector pipelines at the time Enbridge entered into the agreements in question. The Board found that the fact Enbridge Inc. may have profited as a result of Enbridge entering into these contracts was not sufficient evidence to establish that the arrangements were not therefore prudent. However, the Board noted that the interests of Enbridge Inc. and Enbridge might not completely coincide and found the evidence of this ownership interest was "sufficient to overcome the presumption of prudence and invite further inquiry by the Board": paragraph 3.12.11 of the Reasons.

13 The Board noted that it is permissible to use hindsight in determining the threshold issue as to whether the presumption of prudence is rebutted. In this regard, the Board considered the balance in the Notional Deferral Account, which favoured the traditional TransCanada pipeline, and held this evidence would suggest that the prudence of Enbridge's decisions to use the Alliance and Vector routes should be examined.

14 The Board then concluded (at paragraph 3.12.13) that "the presumption of prudence has been overcome and that there are reasonable grounds to inquire into the prudence of [Enbridge's] decisions to enter into long term transportation arrangements with the Alliance and Vector pipelines."

15 The Board then proceeded (from pages 65 to 69) to consider whether Enbridge made prudent decisions to enter into each of the four contracts, examining the circumstances of each decision under a separate subject heading. At this point, the onus would be on Enbridge to establish its prudence in entering into each of the four contracts.

16 Under the heading "Alliance 1" (paragraphs 3.12.14 to 3.12.21), the Board considered the justifications advanced by Enbridge for its decision in 1996 to enter into this contract. The Board focused on what was referred to as the "Otsason Memo", based on Enbridge's testimony that the memo summarized all of the factors Enbridge took into account in making this decision. The Board described the Otsason Memo as a "rudimentary financial analysis". The Board then took issue with a number of

conclusions in the Otsason Memo (the content of which is not relevant for purposes of this appeal) as well as noting Enbridge's failure to consider the full range of reasonable alternatives. The Board then concluded (at paragraph 3.12.23) that it was "not satisfied that [Enbridge's] decision to enter into the Alliance 1 contract in 1996 was prudent".

17 For purposes of this appeal, Enbridge does not take issue with this portion of the Board's Reasons in respect of Alliance 1, except for the Board's reference in paragraph 3.12.20 to the fact that a risk identified in the Ostason Memo had in fact materialized. Mr. McDougall, for Enbridge, submits that this reference illustrates error by the Board in using hindsight to evaluate prudence. The relevant paragraph of the Reasons states:

> 3.12.20 One of the disadvantages identified in the Ostason Memo was the risk of in-service delays for the Alliance pipeline. This risk in fact materialized; the in-service date was delayed by over one year from November 1999 to December 2000. (emphasis added)

18 Under the heading "Alliance 2", the Board held that all of its concerns with respect to Alliance 1 were equally applicable to the 1997 decision to enter into the Alliance 2 contract, and also noted two additional concerns. The Board then concluded (at paragraph 3.12.27) that it was not satisfied that Enbridge's 1997 decision to enter into the Alliance 2 contract was prudent.

19 The Board next considered Vector 1 (paragraphs 3.12.28 to 3.12.31) and concluded that Enbridge's decision to enter into that contract in 1999 was in fact prudent.

20 The last portion of the Board's consideration of prudence falls under the heading "Vector 2" (paragraphs 3.12.32 to 3.12.33). The Board started by noting that Enbridge had "advised" the Board that it entered into the Vector 2 contract in order to replace its expiring capacity on the TransCanada pipeline. The Board then found (at paragraph 3.12.32) that Enbridge "did not provide the Board with sufficient evidence and analysis, including alternatives, to justify this decision." The Board noted that the Vector 2 decision was independent from and unrelated to the Alliance 1 and 2 and Vector 1 contracts. The Board then stated, at paragraphs 3.12.33 to 3.12.34:

> 3.12.33 .... In addition, the Board notes that the costs consequences of the Vector 2 contract were not included in the calculation of the Notional Deferral Account, which is a key element of the Board's prudence review of the Alliance and Vector arrangements. (emphasis added)
>
> 3.12.34 As a result, the Board is not prepared at this time to make a determination of the prudence of [Enbridge's] decision to enter into the Vector 2 contract.

21 Mr. McDougall relies on this passage as a further illustration of the Board's improper use of hindsight in evaluating prudence.

22 The balance of the Board's decision on Alliance and Vector is devoted to "Relief and Remedies" at pages 70-71 of the Reasons and is not relevant for purposes of this appeal.

D. STANDARD OF REVIEW

23 It is well recognized that the applicable standard of appellate review is to be determined on a "functional and pragmatic approach" based on consideration of four factors: (1) the existence or absence of a privative clause in the enabling statute of the administrative tribunal; (2) the expertise of the tribunal relative to the court; (3) the purpose of the legislation; and (4) the nature of the problem: Pushpanathan

v. Canada (Minister of Citizenship and Immigration) (1998), 160 D.L.R. (4th) 193 (S.C.C.) at 208-215; Ryan v. Law Society of New Brunswick (2003), 223 D.L.R. (4th) 577 (S.C.C.) at 587-592, paras. 27-42; Dr. Q. v. College of Physicians & Surgeons (British Columbia) (2003), 223 D.L.R. (4th) 599 (S.C.C.) at 609-13.

24 In this case, the expertise of the tribunal in regulatory matters is unquestioned. This is a highly specialized and technical area of expertise. It is also recognized that the legislation involves economic regulation of energy resources, including setting prices for energy which are fair to the distributors and suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy. That is why courts have accorded considerable deference to the Board and applied standards of reasonableness simpliciter, or even patent unreasonableness when reviewing decisions which engage the Board's expertise: Consumer's Gas Co. v. Ontario (Energy Board), [2001] O.J. No. 5024 (Div. Ct.); Graywood Investments Limited v. Ontario (Energy Board), [2005] O.J. No. 345; ATCO Electric Ltd. v. Alberta (Energy and Utilities Board), [2004] A.J. No. 823 ("ATCO No. 1") (C.A.); ATCO Electric Ltd. v. Alberta (Energy and Utilities Board), [2004] A.J. No. 906 ("ATCO No.2") (C.A.).

25 However, the case before us involves a pure question of law. There is an appeal as of right to this court on a question of law, and there is no applicable privative clause. Further, the nature of the legal issue involved does not engage the expertise of the tribunal, vis a vis the court. The test is well understood and was correctly defined by the Board. The only issue is whether, in applying that test, the Board took into account an impermissible factor. That is not a situation of mixed fact and law, but rather an alleged error in applying the correct legal test. In Housen v. Nikolaisen, [2002] 2 S.C.R. 235 at paragraph 27, the Supreme Court of Canada (referring to its own earlier decision in Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748) held as follows:

> 27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In Southam, supra, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:
>
> > ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.
>
> Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

26 The Supreme Court's illustration applies equally well in the reverse. If the correct test requires the consideration of A, B and C and prohibits the consideration of D, and the decision-maker considers D, that is an error of pure law.

27 Given the right of appeal and the nature of the issue, in my opinion, the appropriate standard of review in this case is one of correctness. The Board was required to be correct on this point. If, in considering prudence, the Board took into account factors involving the application of hindsight, then it

has committed legal error and its decision cannot stand.

E. ANALYSIS

28 It is important to distinguish between things that can be considered at the stage of deciding if the presumption of prudence is rebutted, and things that can be considered as part of the prudence analysis itself. In considering the application of the presumption, it is acceptable to use the benefit of hindsight. Thus, a decision which turned out to have a bad economic outcome will not be presumed to be prudent, but rather will be subject to an analysis of the surrounding circumstances to determine if it was in fact prudent. In this case, the Board had before it evidence from the Notional Deferral Account as to the extra cost incurred by Enbridge as a result of the Alliance and Vector contracts, over and above what would have been the cost if the TransCanada pipeline had been used. The Board was entitled to use that information in determining the threshold issue as to whether the presumption of prudence was rebutted. It was not entitled to use the information as part of its analysis as to whether the decisions at issue were, or were not, prudent at the time they were made.

29 The Board in this case was well aware of that distinction. The Board held, at paragraph 3.12.36 of its decision:

> 3.12.36 The Notional Deferral Account was intended as a measure to ascertain whether the cost differential between the old and the new paths was substantial, such that it would raise the issue of whether the presumption of prudence had been overcome. It was not intended as a method of determining the cost consequences and any potential disallowance of costs if the Board were to find that entering into the Alliance and Vector agreements were not prudent.

30 Notwithstanding the Board's articulation of the proper use of this information, there are two clear references to matters of hindsight in the portion of its reasons dealing with the prudence of Enbridge's decisions.

31 The first such reference is at paragraph 3.12.20 of the Board's reasons in which the Board refers to delay which occurred from November 1999 to December 2000 in determining whether a decision in 1996 was prudent. The impact of this reference could, however, be minimized since it was made in the context of a risk which Enbridge had identified and took into account in 1996. The impact on the decision would obviously be worse if the Board had been pointing out a delay that had occurred after the fact and had not been predicted or considered back in 1996. Therefore, if the only hint of a hindsight type analysis was this one reference, I would not have serious concerns.

32 However, the Board's reference to later events in its analysis of the Vector 2 contract (in paragraph 3.12.33) is more troublesome. The Board had already determined that Enbridge "failed to provide sufficient evidence and analysis, including alternatives, to justify this decision." Since the onus was on Enbridge to establish prudence, that would have been sufficient to support a finding by the Board that Enbridge had not discharged that onus and that the extra costs of that decision could therefore not be passed on to consumers. Obviously, the Board was not required to make such a finding, and it was perfectly open to the Board to defer the matter to give Enbridge an opportunity to file additional evidence. However, the reason cited by the Board for deferring the matter was that the cost consequences of the Vector 2 contract had not been included in the calculation of the Notional Deferral Account. The inescapable inference from this is that the Board felt unable, or was unwilling, to make a decision on prudence without this information. However, information as to what the actual costs of the decision turned out to be after the fact, is clearly an application of hindsight and is not permitted as part of the analysis of prudence.

33 Counsel for the OEB submits that the reference to the Notional Deferral Account relates only to the rebuttal of the presumption of prudence and that the Board was not discussing the use of the financial information as part of its prudence analysis. Rather, he argues, the Board was simply stating it was unable to deal with whether the presumption of prudence applied without the missing information as to actual costs after the fact. I cannot accept that argument. The Board's decision is very logically laid out, as I have discussed above in paragraphs 11 to 22. The Board dealt first with the general test for relevance and then with whether the presumption of prudence was rebutted. It was only after finding the presumption was rebutted that the Board turned to a consideration of each of the four contracts and a determination of prudence in respect of each of them. When the decision is looked at as a whole, it is clear that in paragraphs 3.12.32 to 3.12.34 the Board was dealing with whether the prudence standard had been met for the Vector 2 contract. That is the context in which the Notional Deferral Account is mentioned, and it can only logically be interpreted as referring to the prudence standard.

34 In any event, it was not necessary for the Board to have information from the Notional Deferral Account in order to deal with the presumption of prudence issue. For the Alliance 1, Alliance 2 and Vector 1 contracts, the Board had three bases upon which the presumption was rebutted:

(i) the concession by Enbridge that the presumption was rebutted and that a prudence review was warranted;
(ii) the potential for conflict of interest because of the ownership interest of Enbridge's parent in the Alliance and Vector pipelines; and
(iii) the substantial extra costs actually incurred as demonstrated by the Notional Deferral Account.

35 With respect to the Vector 2 contract, the Board did not have the information from the Notional Deferral Account, but it had already determined that the conflict of interest issue alone was sufficient to rebut the presumption and it had the concession from Enbridge that a review of prudence was appropriate in the circumstances. The Board did not need the Notional Deferral Account information to make its decision on the presumption, and indeed had already made that decision in respect of all four contracts at paragraph 3.12.13 of its Reasons.

36 Counsel for the OEB further argues that since the Board made no decision with respect to Vector 2, its reasoning on Vector 2 is not the subject of this appeal and not relevant to our consideration of whether the Board erred in its analysis of the Alliance contracts. That might well be a valid point if the Board had confined its reasoning in paragraph 3.12.33 to the Vector 2 contract itself. However, the Board referred to the absence of the Deferral Account information for Vector 2 and then commented that this information was "a key element of the Board's prudence review of the Alliance and Vector arrangements". Given the context in which these words appear as well as the actual language used, it seems clear that the Board did in fact consider the actual costs incurred for Alliance as compared to the TransCanada pipeline to be a "key element" in its determination that the Enbridge decision to enter into the Alliance contracts was not prudent.

37 The Board clearly articulated the correct test for the prudence review and appeared to understand that the prudence review must be based on circumstance that were known, or should reasonably have been known, by management making the decision at the time the decision was made. Because the test is so clearly stated by the Board, I have considered very carefully whether the Board's references to matters of hindsight in paragraphs 3.12.20 and 3.12.33 ought to be considered as innocuous, or related to some other analysis. I cannot reach that conclusion. In my view, the Board must be taken to have meant what it said. There are two clear references to a consideration of events which occurred after the decisions were made in the context of the Board's consideration of the prudence of the decisions.

Reading the Board's comments any other way would, in my view, unduly strain the language used, particularly in the context in which those words appear.

38 The retrospective application of the prudence test, ignoring the benefit of hindsight, is not an easy task for a decision-maker who is fully aware of the actual financial consequences of a decision. The decision-maker must shut out of his or her mind all knowledge of matters that are not permitted to be taken into account. This is something which is easier to describe than it is to carry out in practice. In this case, the Board described the test correctly, instructed itself not to use hindsight in evaluating prudence, but then slipped in its application of the test and did allow hindsight to creep into its consideration of prudence. That is a fundamental error of law.

F. CONCLUSIONS

39 There was certainly evidence before the Board upon which it could have reasonably concluded that the Alliance contracts were not prudent. However, it is not possible to determine the extent to which an impermissible line of thinking clouded the Board's determination in this case. This is particularly problematic in that the hindsight considerations involved only the first 10 months of contracts that were to run for a period of 15 years. The appellant is entitled to a decision based on the correct application of the legal test to the relevant facts. In the result, the Board's decision cannot stand and is therefore quashed in so far as it relates to the Alliance 1 and Alliance 2 contracts.

40 The determination of prudence and the remedies flowing from a determination that a particular decision was or was not prudent are matters within the specialized expertise of the Board. Such determinations are intended under the Act to be the sole province of the OEB and ought not to be made by courts. Accordingly, this matter is remitted back to the OEB for consideration by a differently constituted tribunal.

41 If the parties are unable to agree on the costs of this appeal, they may be addressed in writing. Counsel for Enbridge is requested to coordinate the timing of the costs submissions and to forward three copies of all of the submissions, preferably bound and indexed, to the Divisional Court office.

A.M. MOLLOY J.
G.D. LANE J. -- I agree.
D.J. POWER J. -- I agree.

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